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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 372

STATE LODGE OF MICHIGAN, FRATERNAL ORDER ORDER OF POLICE, by its President, Henry Mida, Lodge No. 115 of the State Lodge, HOWARD HEINE and BERNARD L. DUGGAN,
Plaintiffs, Appellants and Petitioners,

vs.

CITY OF DETROIT, a Municipal Corporation, EDWARD J. JEFFRIES, Mayor of the City of Detroit, JOHN H. WITHERSPOON, Commissioner of Police of the City of Detroit, County of Wayne and State of Michigan, LOUIS L. BERG, Superintendent of Police of the City of Detroit, County of Wayne and State of Michigan,
Defendants, Appellees and Respondents

PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF FACTS

To the HonorableSupreme Court of the United States:

Petitioners respectfully show unto the court as follows:

I. Statement of Matter Involved

1. Petitioner, State Lodge of Michigan, Fraternal Order of Police, is a Michigan non-profit corporation; Victory Lodge No. 115, Fraternal Order of Police, is a Local Chapter of Fraternal Order of Police, the membership of which is composed of members of the Police Force of the city of Detroit. Howard Heine and Bernard Duggan are individuals who were police officers of the City of Detroit when this controversy arose. All are citizens of the United States.

2. Defendants below, the city of Detroit, is a Michigan Municipal Corporation, Edward J. Jeffries is its Mayor, and John H. Witherspoon, is Commissioner of Police, and Louis Berg, Superintendent of Police.

3. At the time the controversy involved arose, the Fraternal Order of Police had a national history of 28 years (Vol. I, Exhibits, page 109, Exhibit 46). It consisted of 200 chapters operating in 17 states, and in many large cities including Philadelphia, Cleveland, Cincinnati, Pittsburgh, Wheeling and other cities.

In Michigan, there were 24 chapters, including the largest cities of Grand Rapids, Bay City, Saginaw and Lansing. There were chapters literally surrounding the Detroit area, in Hamtramck, Wyandotte, Lincoln Park, Van Dyke, Royal Oak, Centerline, Birmingham, Pleasant Ridge, Huntington Woods and Wayne County Sheriff's office.

4. In those localities where there are chapters of Fraternal Order, it comprises as to membership a percentage of the local law enforcement bodies of approximately 100% and includes Federal, State and local officers. Police Officials are high in their praise of the organization, and state that it builds morale and makes for better police work (R. 124-226). In Michigan eminent men are honorary

members of local chapters, and J. Edgar Hoover, head of the F.B.I. has approved it (R. 426). The head of the Michigan State Police is a member, and a member of an important committee (R. 96).

5. The aims and purposes of the Fraternal Order of Police are explained in the charter of the National Chapter as follows (R. 15):

> "(a) This organization is formed for the purpose of promoting personal and efficient cooperation between the police officers in the cities of these various states to the end that the public may be better served in the consideration of law and law enforcement.
>
> (b) Advancing social, charitable and educational undertakings among police.
>
> (c) To more effectively combat crime by unity and concerted action in all matters pertaining to law enforcement.
>
> (d) To promote the advancement of crime prevention and detection.
>
> (e) The Fraternal Order of Police denounces disloyalty and our oath of obligation binds us to our allegiance to these United States.
>
> (f) The Fraternal Order of Police stands for justice to humanity and for its rights, safety and developments. We believe in the equality of all before the law.
>
> (g) We advocate the rigid enactment and enforcement of civil service laws for the police of the various states and nation.
>
> (h) The Fraternal Order of Police advocates and will work for the establishment of pension funds for the various cities of these states and nation.
>
> (i) The Fraternal Order of Police is an organization of Police sworn to enforce the laws impar-

tially under all circumstances and has no other affiliations."

6. Some 24 years prior to this controversy, on June 5, 1919, the then Police Commission, of Detroit, James Inches, addressed a communication "To all members of the department" in a general order, numbered 21-B, in which he denounced Fraternal Order, claimed the organizer was a rum-runner, and said (R. 59):

> "In view of these facts, all patrolmen are hereby forbidden to join this organization or to remain members of it, unless they want to be regarded as disloyal to the true interests of the Department."

7. There was no other order in the Detroit Police Department specifically forbidding membership in Fraternal Order of Police until after the controversy arose. Commissioner Watkins in March of 1932, thirteen years after Inches' Order of prohibition, said in an order (247):

> "The limitations on the membership of Department rule to joining organizations are contained in the oath and in Section 124 of the Detroit Police Manual."

Seventeen years later, May 26, 1936, the then Commissioner of Police, still about six years prior to the occurrences involved in this controversy, promulgated Order 347 (62-63). In this order the Commissioner in a communication to all members of the Department called attention to Section 124 of the General Rules of the Police Manual, as follows (R. 62):

> "A member of the Department is prohibited from affiliating with any organization or body, the provisions of the Constitution of which would in any way exact prior consideration and prevent him from performing police duty."

He also called attention to the police oath (R. 62):

> "I, ... do solemnly swear that I will support the constitution of the United States, the Constitution of the State of Michigan, obey the Rules and Regulations of the Detroit Police Department, and faithfully perform the duties of a policeman.
>
> "And I will not be or become a member of any organization prohibited by the rules of the Detroit Police Department, or any organization whatever which is affiliated with any organization which holds or claims or exercises the right to demand obedience of men or to direct me to disobey any of the rules of the Detroit Police Department—So help me God."

He then ordered as follows (63):

> "Any member belonging to organizations in conflict with the above shall immediately sever all connections."

8. On January 26, 1943, petitioner Heine, had been called to Police Headquarters to the office of the Superintendent concerning a routine matter, and while there the Superintendent inquired as to ticket sales to policemen for places at a banquet to be held, of which sales, the Superintendent had become aware. Heine explained that it was to be a social gathering. The Superintendent made it clear there could be no unions or organizations other than those already allowed by the Commissioner, and gave permission to hold the dinner (Exhibit Vol II, pages 46-51).

9. The dinner was held in a hotel on Thursday January 28, 1943. Early in the evening about a dozen men presented themselves, wholly unexpected and all unknown to Heine, two from Dearborn, and six from Hamtramck, and

the rest Detroit Police Officers. They stated that they had been invited by members of the Detroit Police Department, and were made welcome by those present. One of the Dearborn men, Mida, explained Fraternal Order of Police, and invited those present to join. Heine explained that permission would have to be obtained from the Police Officials. A temporary organization was formed, with Heine as President, and Duggan as Secretary, to go to the Superintendent to ask for permission to enter into the organization. No discussion about the organization had been had prior to the dinner (Exh. Vol. II, pages 51-73).

10. A Newspaper Reporter was present at this meeting upon invitation, and the Commissioner of Police had himself been invited, and also one of the members of the Common Council. The latter two did not attend, but the reporter was present (Ex. Vol. II, p. 15-16 & 50).

11. The first thing the Commissioner of Police heard about organizing a chapter in Detroit was when he read a newspaper report the next day (R. 379-80). Petitioner Heine was then called to the Superintendent's office on January 30, 1943 (R. 380) where he was interrogated by the Commissioner and the Superintendent (Exh. 139, Exh. Vol. II, p. 46-80). In response to questions, Heine related the occurrences at the meeting as above set forth and denied that there was as yet any organization of the Fraternal Order, but that there was a temporary organization for the purpose of getting permission to organize, of which he was president. He denied any knowledge of the 24 year old order barring membership, but read it at the time. He himself had joined the Police Department in 1923, 4 years after the order had been made. He stated he did not believe his continuance as President of the temporary organization violated the order because there

would be no chapter organized until permission was granted.

12. Duggan was similarly interrogated on February 1, 1943 (Ex. 130, Exh. Vol. II, pp. 11-46). He admitted being a member of Fraternal Order of Police at that time, having joined the Saturday preceding. He stated that Heine had first approached him about the dinner, and he believed that it was a good idea, because he believed something should be done towards getting some kind of representation of the rank and file of police officers. He explained his own personal financial and other situations, and his inability to get anything done about it, as an example. He had had no knowledge before hand that this particular organization was to be discussed however. His explanation of the occurrences at the dinner were similar to Heine's. He refused to disclose matters he deemed secret about the organization. He said Exhibit Vol II, pages 26-27:

> "Q. Therefore you deliberately violated what you understood was a departmental order?
>
> "A. No, I am going to qualify my answer, because I can't answer that way. We still have the right under the Constitution to the right of assembly. When I compromise myself in the department —or anyone else, we still have the right to assembly. Now it is the understanding of a great number of men that the order does prohibit men from assemblage."

Duggan never knew of the old order of Commissioner Inches until he read it in a newspaper in the article concerning the meeting. He had been a member of the Police Department eight years. He had not previously known that the Department had any contact of any kind with Fraternal Order of Police.

13. Charges were filed against both Heine and Duggan, and notwithstanding the Detroit City Charter provides that they may not be dismissed except for good cause shown, upon trial by a Police Board, they were found guilty of insubordination, and discharged (R. 35).

14. On February 3, 1943, petitioners started their Chancery action in Wayne Circuit Court, the amended and supplemental bill (R. 29-42) charging as follows (R. 33-38):

> "8. Plaintiffs allege that the said order and all acts of defendant Witherspoon and all of the other defendants in pursuance thereof are unlawful and unreasonable, and are discriminatory as applied to these plaintiffs, and exceed and are in violation of any powers or authority possessed by any of the defendants by virtue of any provision of the charter of the city of Detroit or any other source, and are therefore void and of no effect.
>
> 9. That notwithstanding the said defendants have unlawfully confederated and conspired together, among themselves, and with divers other persons to these plaintiffs unknown, to enforce said orders and to prevent and forbid any police officer of the city of Detroit from becoming a member in the Fraternal Order of Police, and to prevent and forbid plaintiff State Lodge of Michigan Fraternal Order of Police, and Lodge 115, aforesaid and plaintiff Henry Mida, from aiding and assisting them to become members and from promoting and bringing about their membership therein, and to discharge, or take action for the purpose of discharging any police officer of the city of Detroit who does any of those things.
>
> 10. And in the furtherance of the aforesaid unlawful conspiracy and confederation, and also individually and separately said defendants have embarked upon a campaign designed for its further-

ance and to attain its objects and have done and performed certain acts in furtherance thereof, both in pursuance of such unlawful conspiracy and confederation and individually and separately, as follows:

(a) They have threatened to bring charges against any police officer of the city of Detroit who may become a member of Fraternal Order of Police, for the purpose of bringing about disciplinary action against him, threatening to dismiss and discharge him from his service as said police officer and have caused it to be known among police officers of the city of Detroit that they would do so.

(b) They have brought false charges of conduct unbecoming an officer and other false charges against certain police officers of the city of Detroit, and have procured their discharge and dismissal from their services as such police officers, particularly plaintiffs Heine and Duggan, on account of the activities of said police officers in behalf of Fraternal Order of Police.

(c) They have falsely attributed to and charged the Fraternal Order of Police with certain customs, practices and acts, claimed to be inimical to and in violation of the duties of its members as police officers; and more particularly they have falsely charged that the Order gives cards to certain individuals called courtesy cards, by reason of the possession of which the holder receives certain immunities from enforcement of certain laws by members of the Order; that associate and honorary memberships are offered and given by said order to certain individuals for a like purpose and for the purpose of securing untoward influence in behalf of said order and with a like result; that the Order or its members collect sums of money from certain persons, using as a lever to the effect that purpose the fact that they are police

officers; and these plaintiffs allege that all of said charges are false and untrue and have no foundation in fact and are unreasonable and unwarranted, and contrary to the rights of plaintiffs as hereinafter further set forth.

(d) They have sought to intimidate police officers of the city of Detroit and have intimidated them in this respect by publishing their aforesaid threats and falsifications and by causing certain officers to be brought to police headquarters for questioning and grilling by their superior offices to be brought to police headquarters for questioning and grilling by their superior officers, and by communicating their false charges and threats to other departments of the city government, more particularly the Common Council for the city of Detroit, and in the public press and radio, all of which acts are unreasonable and unwarranted and against the rights of plaintiff as hereinafter further set forth.

(e) They have brought or caused to be brought before the Police Trial Board a body provided for and created by Chapter 21 of the City of Detroit, authorized and empowered thereby to hear and determine charges against police officers of the city of Detroit, false charges against certain police officers, based upon their activities in behalf of Fraternal Order of Police, and have supported said false charges by evidence unfounded in fact and unsupported in law, and thus brought about a purported discharge and dismissal from their services as police officers, particularly plaintiffs Duggan and Heine; all of which is in violation of the rights of tenure granted to said police officers by the provisions of Chapter 21 of the said Charter of the City of Detroit, and deprived them of their means of livelihood, and will no longer allow them to pursue their duties

as police officers, nor receive their compensation for the same, to all of which said purportedly discharged persons are still entitled notwithstanding such false and invalid discharges.

(f) And the said defendants have further, under threats of the same penalties, forbidden and prevented police officers from becoming members of said Fraternal Order of Police, or from applying for membership therein, from paying dues or initiation fees, from meeting together in groups of assemblies to discuss or make plans for the same, or from discussing the same as individuals with others who are members, or with non-members.

(g) The said defendants have done and performed all of the foregoing acts in opposition to police officers of the city of Detroit joining or being initiated in, instructed in or active in Fraternal Order of Police, during which time they have tolerated and even encouraged other organizations and groups among said police officers and among other employees of the city government concerning which said organizations there is no valid or reasonable distinction as compared with Fraternal Order of Police, and no reasonable basis for such discrimination in this respect, all of which is unreasonable and unwarranted and contrary to the rights of these plaintiffs as hereinafter more fully set forth.

11. That these plaintiffs charge that all of the aforesaid acts of defendants, both in pursuance of the said alleged conspiracy and confederation, and individually and separately, are contrary to the rights of these plaintiffs in that they violate their rights to peaceably assemble as guaranteed by the 1st and 14th Amendments to the Constitution of the United States, and by Article 2, Section 2, of the Constitution of the State of Michigan, deny to plaintiffs and to abridge their privileges and immunities

as citizens of the United States, contrary to the said 14th Amendment to the Constitution of the United States, and deny them the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States, and abridge and restrain the right of free speech guaranteed these plaintiffs by the 1st and 14th Amendments to the Constitution of the United States and by Article II, Sec. 4, of the Constitution of the State of Michigan."

15. The bill prayed that the order of Commissioner Inches be declared void, that the order discharging Duggan and Heine be declared void, and for injunctive relief.

16. Trial was had in Wayne Circuit Court and on June 11, 1945 a decree was there entered dismissing the bill (R. 531-2).

17. An appeal was taken by the plaintiffs to the Supreme Court of the State of Michigan, based upon Reasons and Grounds of Appeal as follows (R. 535-536):

"(1) The findings of the court are against the great weight of the evidence.

(2) The decree is against the great weight of the evidence.

(3) The court erred in finding that the cause is controlled by a previous decision of the Supreme Court of the State of Michigan.

(4) The court erred in finding that membership and activity in Fraternal Order of Police, Victory Lodge, is inimical to police duties.

(5) The court erred in deciding the matter as a question of law rather than a question of fact.

(6) The court erred in finding that there was cause for discharge of plaintiffs Duggan and Heine by Police Trial Board.

(7) There was no evidence upon which the discharge of plaintiffs Duggan and Heine by Police Trial could be properly based.

(8) The decree is contrary to law.

(9) The court erred in holding that Police Officers may not become members in Fraternal Order of Police.

(10) The court erred in holding that plaintiffs' constitutional rights under the due process clauses of the State and Federal Constitutions had not been violated.

(11) The court erred in holding that the constitutional rights of plaintiffs to freedom of assembly under the state and federal constitutions had not been violated.

(12) The court erred in holding that the constitutional rights of plaintiffs to freedom of speech under state and federal constitutions had not been violated.

(13) The court erred in holding that constitutional rights of plaintiffs to equal protection of the laws had not been violated.

(14) The court erred in finding that there was any order or ruling of Detroit Police Department prohibiting membership in Fraternal Order of Police, Victory Lodge 115.

(15) The court erred in finding that the order barring membership in Fraternal Order of Police, if any, was a reasonable order.

(16) The court erred in finding that the orders of discharge of plaintiffs Heine and Duggan were reasonable orders."

18. The Supreme Court of the State of Michigan, on May 16, 1947, rendered its opinion and entered its Decree affirming the Decree of the lower court (See certified Rec-

ord). This opinion is to be found in *State Lodge of Michigan, Fraternal Order of Police v. City of Detroit,* 318 Mich. 182.

19. Subsequently a motion for rehearing was filed on the following grounds (See Certified Record, Motion for Rehearing):

> "(1) The decision of this court denies to appellants the right to peaceably assemble, which is a right guaranteed to them as a privilege and immunity of citizens of the United States under the 14th Amendment to the Constitution of the United States.
>
> (2) The decision of this court deprives appellants of property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.
>
> (3) The decision of this court denies to appellants the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States."

20. This motion for rehearing was denied by the Michigan Supreme Court on June 27, 1947 (See Certified Record, Order denying motion for rehearing).

II.

STATEMENT OF JURISDICTION

21. Petitioners claim that this court has jurisdiction to issue its Writ of Certiorari to the Supreme Court of the State of Michigan, to review its affirmance on May 16, 1947, of the Decree of the Trial Court, under the provisions of the Act of Congress of February 13, 1925, Chapter 229, 43 Sta. 936, as amended, Section 237(b) thereof, which provides as follows:

Sec. 237(b). "It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where *any title, right, privilege or immunity* is specially set up or claimed by either party under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States, and the power to review under this paragraph may be exercised as well where the Federal Claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

III.

QUESTIONS PRESENTED

22. The questions presented by this Petition for Writ of Certiorari are as follows:

Does not the Departmental Order of James Inches, then Commissioner of Police of the City of Detroit, issued June 5, 1919, the present enforcement of it by the defendants, and the discharge of petitioners Heine and Duggan for acts contrary thereto,

(a) Violate petitioners' right of assembly as guaranteed by Article II, Sec. 2 of the Constitution of the State of Michigan, and the 14th Amendment to the Constitution of the United States?

(b) Deprive petitioners of property without due process of law, contrary to the 14th amendment to the Constitution of the United States?

(c) Deny to petitioners the equal protection of the laws as guaranteed by the 14th amendment to the Constitution of the United States?

IV.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT OF CERTIORARI

23. Petitioners rely upon the following reasons as to why this court should issue its Writ of Certiorari:

(a) The Supreme Court of the State of Michigan has decided a Federal question not heretofore decided by this court. We find no decision of this court which determines the question of whether or not a police officer may join and be active in a Fraternal Order, merely because his Superiors say he may not under penalty of losing his position, when under the Charter provisions governing the Police Department he may only be discharged for good cause shown.

(b) We think the question is one of general interest and importance which probably affects the existence of 200 presently existing chapters of Fraternal Order of Police, and upon its determination depends the question of the expansion of this Fraternal Order, with all the demonstrated benefits to police work.

Wherefore, these petitioners pray that a Writ of Certiorari issue out of this Court directed to the Supreme

Court of the State of Michigan, to review the decision of that court of May 16, 1947 affirming the Decree of the Trial Court.

State Lodge of Michigan Fraternal Order of Police

By Henry Mida,
Its President,

Lodge No. 115 of the State Lodge,
By Howard Heine,
Its President,

Bernard Dugan

Howard Heine

EDWARD N. BARNARD,
Attorney for Petitioners,
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Detroit 26, Michigan.

State of Michigan,
County of Wayne—ss.

On this 20th day of September 1947, before me, a Notary Public in and for said county, personally appeared Henry Mida, Howard Heine and Bernard Duggan, petitioners named in the foregoing petition, who made oath and said that they have read the foregoing petition by them subscribed, and know the contents thereof, and that the same is true, except as to matters therein stated to be upon information and belief, and as to those matters they believe it to be true, and that they have authority to sign in their respective capacities.

Agnes Secor,
Notary Public, Wayne County, Michigan.
My commission expires January 9, 1950.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

PRELIMINARY STATEMENT

This brief is filed in support of a petition for a Writ of Certiorari to the Michigan Supreme Court, to review its affirmance of a decree of the trial court, dismissing the petitioners' bill of complaint in a chancery action. The

petitioners are the State Chapter, and the Local Detroit Chapter of Fraternal Order of Police, a fraternal organization composed entirely of law enforcement officers, and two individuals who were formerly members of the Detroit Police Department. Respondents are administrative police officials. The two police officers were discharged from the police department for activities in the Fraternal Order of Police. It is the claim herein, on behalf of the petitioners, that they are deprived of constitutional rights, particularly the right of peaceable assembly as guaranteed by the 14th amendment.

II.

STATEMENT OF FACTS

The petition sets up the following facts:

Petitioners, Duggan and Heine, were two police officers of the city of Detroit. They, particularly Heine, late in January 1943, conceived the idea of a social dinner among police officers, and commenced the sale of tickets for such dinner among the officers of the Department. On the 26th day of that month, Heine was in the office of respondent, Superintendent Berg, on a routine matter, and there Berg inquired of him concerning the nature of this dinner, which Heine explained. Berg stated that there must be no organization in the police department except those permitted by the administrative officials, and gave permission for the dinner (Exh. Vol II, pp. 46-51).

No particular organization was in anybody's mind, so Duggan at least stated. When Heine proposed the dinner to him he though it was a good thing, because he believed that the rank and file ought to have some adequate representation in the Department. He cited his own very bad financial condition, and his inability to get anything done

about it through any of the organizations that were already existing in the Department. He had been unable to get representation through these organizations (Exh. Vol. II, Exhibit 30, page 13-15).

The dinner was held at a hotel on January 28, 1943, about 100 policemen attending (See Exh. Vol II, p. 71). No discussion about any particular organization had been had prior thereto. Early in the evening however, about ten persons presented themselves to those assembled at the dinner, these persons being unknown to both Heine and Duggan, and stated that they had been invited to attend by members of the Department, and they were made welcome. One of them, Henry Mida, was President of the State Lodge of Fraternal Order of Police, and a Dearborn Police Officer. Mida explained the Fraternal Order and suggested that the Detroit officers join. Heine explained that permission would have to be obtained from their superiors. A temporary organization however was there set up, with Heine as President and Duggan as Secretary, for the purpose of obtaining permission to organize a chapter of the Fraternal Order of Police in Detroit, (Exhibit Vol. II, Ex. 139, pp. 50-53, and Exh. 130, pp. 15-18).

The Commissioner and Superintendent of Police, two of the respondents here, had been invited to attend this dinner, as was also one of the members of the city Council and a newspaper reporter. None but the reporter attended (Exh. Vol II, pp. 15-16, 55-72).

The history and description of Fraternal Order of Police comprise testimony in the record covering over 100 pages, and the examination of some twenty witnesses, many executive police officers of different cities (R. 124-226). At the time the controversy arose, the Fraternal Order had a national history of 28 years (Vol. I, Exhibits,

page 109 Exhibit 46). It consisted of 200 chapters, operating in 17 states, and in many large cities including Philadelphia, Cleveland, Cincinnati, Pittsburgh, Wheeling and other cities.

In Michigan, there were 24 chapters, including the largest cities of Grand Rapids, Bay City, Saginaw, and Lansing. There were chapters literally surrounding the Detroit area, in Hamtramck, Wyandotte, Lincoln Park, Van Dyke, Royal Oak, Centerline, Birmingham, Pleasant Ridge, Huntington Woods and Wayne County Sheriff's office.

In those localities where there are chapters of Fraternal Order, it comprises as to membership approximately 100 per cent of the local law enforcement bodies and includes federal state and local officers. Police officials are high in their praise of the organization, and state that it builds morale and makes for better police work (R. 124-226). It engages in charitable projects, provides social and recreational facilities for its members, organizes plans to combat juvenile delinquencies, conducts educational programs in police work, and engages in liberty bond drives. In Michigan eminent men are honorary members and J. Edgar Hoover, head of the F.B.I., has indicated approval of it (R. 426). The head of the Michigant State Police is a member and a member of an important committee (R. 96). The State Treasurer and a member of the Supreme bench are honorary members (R. 426).

The aims and purposes of the Fraternal Order of Police are explained in charter provisions of the National Chapter as follows (R. 15):

> "(a) This organization is formed for the purpose of promoting personal and efficient cooperation between the police officers in the cities of these various states to the end that the public may be

better served in the consideration of law and law enforcement.

(b) Advancing social, charitable and educational undertakings among police.

(c) To more effectively combat crime by unity and concerted action in all matters pertaining to law enforcement.

(d) To promote the advancement of crime prevention and detection.

(e) The Fraternal Order of Police denounces disloyalty and our oath of obligation binds us to our allegiance to these United States.

(f) The Fraternal Order of Police stands for justice to humanity and for its rights, safety and developments. We believe in the equality of all before the law.

(g) We advocate the rigid enactment and enforcement of civil service laws for the police of the various states and nation.

(h) The Fraternal Order of Police advocates and will work for the establishment of pension funds for the various cities of these states and nation.

(i) The Fraternal Order of Police is an organization of Police sworn to enforce the laws impartially under all circumstances and has no other affiliations."

Some 24 years prior to this controversy, on June 5, 1919, the then Police Commissioner of Detroit, James Inches, had addressed a communication "To all members of the Department," in a general order, numbered 21-B, in which he denounced Fraternal Order of Police, claiming the organizer was a rum-runner, and said (R. 59):

> "In view of these facts, all patrolmen are hereby forbidden to join this organization or to remain members of it, unless they want to be regarded as disloyal to the true interests of the Department."

There was no other order in the Detroit Police Department specifically forbidding membership in Fraternal Order of Police, until after the controversy arose. Commissioner Watkins in March 1932, thirteen years after Inches' Order of prohibition, said in an order (R. 247):

> "The limitations on the membership of Department Rule to joining organizations are contained in the oath and in Section 124 of the Detroit Police Manual."

Seventeen years afterward, on May 26, 1936, the then Commissioner of Police, still about six years prior to the occurrences involved in this controversy, promulgated Order 347 (R. 62-63). In this order the Commissioner called attention to Sec. 124 of the general rules of the Police Manual, as follows (R. 62):

> "Prior claim on Police Duty. A member of the Department is prohibited from affiliating with any organization or body, the provisions of the Constitution of which would in any way exact prior consideration and prevent him from performing police duty."

He also called attention to the Police Oath (R. 62):

> "I ..... do solemnly swear that I will support the Constitution of the United States, the Constitution of the State of Michigan, obey the Rules and Regulations of the Detroit Police Department, and faithfully perform the duties of a policeman.
>
> "And I will not be or become a member of any organization prohibited by the rules of the Detroit

> Police Department, or any organization whatever which is affiliated with any organization which holds or claims or exercises the right to demand obedience of men or to direct me to disobey any of the rules of the Detroit Police Department — So help me God."

He then ordered as follows (63):

> "Any member belonging to organizations in conflict with the above shall immediately sever all connections."

The first thing the Commissioner of Police had heard anything about organizing a chapter in Detroit was when he read a newspaper report the next day, January 29, 1943, giving an account of the dinner (R. 379-80).

Petitioner Heine was then called to the Superintendent's office on January 30, 1943 (R. 380) where he was interrogated by the Commissioner and the Superintendent (Exh. 139, Exh. Vol II, p. 46-80). In response to questions, Heine related the occurrences at the meeting as above set forth and denied that there was as yet any organization of the Fraternal Order, but that there was a temporary organization for the purpose of getting permission to organize, of which he was President. He denied any knowledge of the 24-year old order barring membership, but it was handed to him and he read it at that time. He himself had joined the Police Department in 1923, 4 years after the order had been made. He stated he did not believe his continuance as President of the temporary organization violated the order because there would be no chapter organized until permission was granted. He stated that he would not become a member if permission were not granted. He attended a second meeting the same day however.

Duggan was similarly interrogated on February 1, 1943, (Exh. 130, Exh. Vol. II, pp. 11-46). He admitted being a member of Fraternal Order of Police, having joined the Saturday preceding his interrogation at this second meeting. His explanation of the occurrences at the dinner were similar to Heine's. He refused to disclose matters he deemed secret about the organization. He said (Exhibit Vol. II, p. 26-27):

> "Q. Therefore you deliberately violated what you understood was a departmental order?
>
> "A. No, I am going to qualify my answer, because I can't answer that way. We still have the right under the Constitution to the right of assembly. When I compromise myself in the Department — or anyone else, we still have the right to assembly. Now it is the understanding of a great number of men that the order does prohibit men from assemblage."

Duggan never knew of the old order of Commissioner Inches until he read it in the newspaper in the Article concerning the meeting. He had been a member of the Police Department eight years. He had not previously known that the Department had any contact of any kind with Fraternal Order of Police, knew practically nothing himself about the organization previously.

Charges were filed against Heine & Duggan (R. 23-29, Defendants' Exhibits A to F inclusive), and they appeared before a police board pursuant thereto. After hearing, they were discharged on February 5th and 6th respectfully, for insubordination, based upon their activities in Fraternal Order of Police (R. 374-377, Exhibits 128, 192 & 130).

The present Commissioner and the other respondents violently opposed organization of a chapter of the Fra-

ternal Order of Police among Detroit Police officers. On February 3, 1943, the Commissioner addressed a communication, "To all members of the department" (R. 63-66. Defendants Exh. C, General Order No. 561), in which he said in reference to the 24-year old order of Commissioner Inches (R. 64).

> "This order has never been rescinded and is in full force and effect at this time."

In this communication he ordered the men not to join or remain members (R. 66).

Later, on February 23, 1943, the Commissioner addressed a communication to the Common Council setting forth the situation in detail from his standpoint, and reciting his objections to the organization (R. 69-76, Defendants' Exh. F). In Order No. 561, and this later communication, it appears that his objections were, as he claimed, that the object of the organization was primarily to raise money, to solicit funds from private persons, that it was a labor union, that its use of automobile emblems and honorary memberships was detrimental to police work.

When the Constitution for Victory Lodge 115, the Detroit Local Lodge, was adopted, it contained the following provisions (R. 82, 83, Exhibit 3):

The preamble recites in part:

> "The Constitution and By-Laws of the National Organizational Organization and also of the State Lodge of Michigan of the Fraternal Order of Police, where not inconsistent with the Constitution and By-laws of Victory City Lodge — 115 are also regarded as governing this Lodge, but where such National and State Constitution are inconsistent with the Constitution and By-laws of this local

lodge, the constitution and by-laws of Victory City Lodge 115 of the Fraternal Order of Police, shall govern and control all of its purposes, objects, organizations and activities."

Article II, Sections 9, 19 and 11 are as follows:

Sec. 9. "The Fraternal Order of Police IS NOT and CANNOT affiliate with any labor organization."

Sec. 10. "This Lodge shall not permit any persons who are not or have not been police officers, to become or remain members of the Lodge. The Lodge shall not permit Associate or Honorary Memberships, Courtesy cards, emblem plates or any other privileges to persons who are not or have not been police officers."

Sec. 11. "No oath administered to any incoming new member or to any officer; and no part or portion of any ritual of the lodge, shall contain anything inconsistent with or inimical to any of the objects expressed in this article of the constitution or in any other portion thereof or of the By-Laws."

On February 3, 1943, petitioners started their Chancery Action in the Wayne Circuit Court, the amended and supplemental bill (R. 29-42) charging as follows (R. 33-38):

"8. Plaintiffs allege that the said order and all acts of defendant Witherspoon and all of the other defendants in pursuance thereof are unlawful and unreasonable, and are discriminatory as applied to these plaintiffs, and exceed and are in violation of any powers or authority possessed by any of the defendants by virtue of any provision of the charter of the city of Detroit or any other source, and are therefore void and of no effect.

9. That notwithstanding the said defendants have unlawfully confederated and conspired to-

gether, among themselves, and with divers other persons to these plaintiffs unknown, to enforce said orders and to prevent and forbid any police officer of the city of Detroit from becoming a member in the Fraternal Order of Police, and to prevent and forbid plaintiff, State Lodge of Michigan, Fraternal Order of Police, and Lodge 115, aforesaid, and plaintiff Henry Mida, from aiding and assisting them to become members and from promoting and bringing about their membership therein, and to discharge or take action for the purpose of discharging any police officer of the city of Detroit who does any of these things.

10. And in the furtherance of the aforesaid unlawful conspiracy and confederation, and also individually and separately said defendants have embarked upon a campaign designed for its furtherance and to attain its objects and have done and performed certain acts in furtherance thereof, both in pursuance of such unlawful conspiracy and confederation and individually and separately, as follows:

(a) They have threatened to bring charges against any police officer of the city of Detroit who may become a member of Fraternal Order of Police, for the purpose of bringing about disciplinary action against him, threatening to dismiss and discharge him from his service as said police officer and have caused it to be known among police officers of the city of Detroit that they would do so.

(b) They have brought false charges of conduct unbecoming an officer and other false charges against certain police officers of the city of Detroit, and have procured their discharge and dismissal from their services as such police officers, particularly plaintiffs Heine and Duggan, on account of the activities of said police officers in behalf of Fraternal Order of Police.

(c) They have falsely attributed to and charged the Fraternal Order of Police with certain customs, practices and acts, claimed to be inimical to and in violation of the duties of its members as police officers; and more particularly they have falsely charged that the Order gives cards to certain individuals called courtesy cards, by reason of the possession of which the holder receives certain immunities from enforcement of certain laws by members of the Order; that associate and honorary memberships are offered and given by said order to certain individuals for a like purpose and for the purpose of securing untoward influence in behalf of said order and with a like result; that the Order or its members collect sums of money from certain persons, using as a lever to the effect that purpose the fact that they are police officers; and these plaintiffs allege that all of said charges are false and untrue and have no foundation in fact and are unreasonable and unwarranted, and contrary to the rights of plaintiffs as hereinafter further set forth.

(d) They have sought to intimidate police officers of the city of Detroit and have intimidated them in this respect by publishing their aforesaid threats and falsifications and by causing certain officers to be brought to police headquarters for questioning and grilling by their superior officers, and by communicating their false charges and threats to other departments of the city government, more particularly the Common Council for the city of Detroit, and in the public press and radio, all of which acts are unreasonable and unwarranted and against the rights of plaintiff as hereinafter further set forth.

(e) They have brought or caused to be brought before the Police Trial Board, a body

provided for and created by Chapter 21 of the City of Detroit, authorized and empowered thereby to hear and determine charges against police officers of the city of Detroit, false charges against certain police officers, based upon their activities in behalf of Fraternal Order of Police, and have supported said false charges by evidence unfounded in fact and unsupported in law, and thus brought about a purported discharge and dismissal from their services as police officers, particularly plaintiffs Duggan and Heine; all of which is in violation of the rights of tenure granted to said police officers by the provisions of Chapter 21 of the said Charter of the City of Detroit, and deprived them of their means of livelihood, and will no longer allow them to pursue their duties as police officers, nor receive their compensation for the same, to all of which said purportedly discharged persons are still entitled nothwithstanding such false and invalid discharges.

(f) And the said defendants have further, under threats of the same penalties, forbidden and prevented police officers from becoming members of said Fraternal Order of Police, or from applying for membership therein, from paying dues or initiation fees, from meeting together in groups of assemblies to discuss or make plans for the same, or from discussing the same as individuals with others who are members, or with non-members.

(g) The said defendants have done and performed all of the foregoing acts in opposition to police officers of the city of Detroit joining or being initiated in, instructed in or active in Fraternal Order of Police, during which time they have tolerated and even encouraged other organizations and groups among said police officers and among other employees of the city government concerning which said organizations there is no valid or reasonable distinction as compared

with Fraternal Order of Police, and no reasonable basis for such discrimination in this respect, all of which is unreasonable and unwarranted and contrary to the rights of these plaintiffs as hereinafter more fully set forth.

11. That these plaintiffs charge that all of the aforesaid acts of defendants, both in pursuance of the said alleged conspiracy and confederation, and individually and separately, are contrary to the rights of these plaintiffs in that they violate their rights to peaceably assemble as guaranteed by the 1st and 14th Amendments to the Constitution of the United States, and by Article 2, Section 2, of the Constitution of the State of Michigan, deny to plaintiffs and to abridge their privileges and immunities as citizens of the United States, contrary to the said 14th Amendment to the Constitution of the United States and deny them the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States and abridge and restrain the right of free speech guaranteed these plaintiffs by the 1st and 14th Amendments to the Constitution of the United States and by Article II, Sec. 4, of the Constitution of the State of Michigan."

The bill prayed that the order of Commissioner Inches be declared void, that the order discharging Duggan and Heine be declared void and that they be reinstated, and for injunctive relief.

Trial was had in Wayne Circuit Court and on June 11, 1945 a decree was there entered dismissing the bill (R. 531-2).

An appeal was taken by the plaintiffs to the Supreme Court of the State of Michigan, based upon the reasons and grounds of appeal as follows (R. 535-536):

"(1) The findings of the court are against the great weight of the evidence.

(2) The decree is against the great weight of the evidence.

(3) The court erred in finding that the cause is controlled by a previous decision of the Supreme Court of the State of Michigan.

(4) The court erred in finding that membership and activity in Fraternal Order of Police, Victory Lodge, is inimical to police duties.

(5) The court erred in deciding the matter as a question of law rather than a question of fact.

(6) The court erred in finding that there was cause for discharge of plaintiffs Duggan and Heine by Police Trial Board.

(7) There was no evidence upon which the discharge of plaintiffs Duggan and Heine by Police Trial could be properly based.

(8) The decree is contrary to law.

(9) The court erred in holding that Police Officers may not become members in Fraternal Order of Police.

(10) The court erred in holding that plaintiffs' consitutional rights under the due process clauses of the State and Federal Constitutions had not been violated.

(11) The court erred in holding that the constitutional rights of plaintiffs to freedom of assembly under the State and Federal Constitutions had not been violated.

(12) The court erred in holding that the constitutional rights of plaintiffs to freedom of speech under state and federal constitutions had not been violated.

(13) The court erred in holding that constitutional rights of plaintiffs to equal protection of the laws had not been violated.

(14) The court erred in finding that there was any order or ruling of Detroit Police Department prohibiting membership in Fraternal Order of Police, Victory Lodge 115.

(15) The court erred in finding that the order barring membership in Fraternal Order of Police, if any, was a reasonable order.

(16) The court erred in finding that the orders of discharge of plaintiffs Heine and Duggan were reasonable orders."

The Supreme Court of the State of Michigan, on May 16, 1947, rendered its opinion and entered its Decree affirming the Decree of the lower court (See certified Record). This opinion is to be found in *State Lodge of Michigan, Fraternal Order of Police v. City of Detroit,* 318 Mich. 182.

Subsequently a motion for rehearing was filed on the following grounds (See certified Record, Motion for Rehearing):

"(1) The decision of this court denies to appellants the right to peaceably assemble, which is a right guaranteed to them as a privilege and immunity of citizens of the United States under the 14th Amendment to the Constitution of the United States.

(2) The decision of this court deprives appellants of property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

(3) The decision of this court denies to appellants the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States."

This motion for rehearing was denied by the Michigan Supreme Court on June 27, 1947 (See Certified Record, Order denying motion for rehearing).

III.

QUESTIONS PRESENTED

The questions presented by the Petition for Writ of Certiorari are as follows: As charged in the bill of complaint in the trial court (R. 37-38, par. 11 of bill) throughout the trial, and in the Supreme Court by reasons and grounds of appeal (R. 535-536) and in a motion for rehearing:

Q. Does not the Departmental Order of James Inches, then Commissioner of Police of the city of Detroit, issued June 5, 1919, the present enforcement by the defendants, and the discharge of petitioners Heine and Duggan for acts contrary thereto,

(a) Violate petitioners' right of assembly as guaranteed by Article II, Section 2 of the Constitution of the State of Michigan, and the Fourteenth Amendment to the Constitution of the United States?

(b) Deprive petitioners of property without due process of law contrary to the fourteenth amendment to the Constitution of the United States?

(c) Deny to petitioners the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

Every question arising under the Constitution may, if properly raised in a State Court come ultimately to this court for decision: *Hague v. C.I.O.*, 59 S. Ct. 954, 307 U. S. 496, 83 L. Ed. 1423.

IV.

STATEMENT OF JURISDICTION

21. Petitioners claim that this court has jurisdiction to issue its Writ of Certiorari to the Supreme Court of the State of Michigan, to review its affirmance on May 16, 1947, of the Decree of the Trial Court, under the provisions of the Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 936, as amended, Section 237 (b) thereof, which provides as follows:

> Sec. 237(b) "It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where *any title, right, privilege or immunity* is specially set up or claimed by either party under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States, and the power to review under this paragraph may be exercised as well where the Federal Claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Every question arising under the Constitution may, if properly raised in the State Court, come ultimately to this Court for decision: *Hague v. C.I.O.*, 59 S. Ct. 954, 307 U. S. 496, 83 L. Ed. 1423.

V.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT OF CERTIORARI

Petitioners rely upon the following reasons as to why this court should issue its Writ of Certiorari:

(a) The Supreme Court of the State of Michigan has decided a Federal Question not heretofore decided by this court. We find no decision of this court which determine the specific question of whether or not a police officer may join and be active in a Fraternal Order, merely because his superiors say he may not do so under penalty of losing his position, particularly when under the Charter Provisions governing the Police Department he may only be discharged for good cause shown.

(b) We think the question is one of general interest and importance which probably affects the existence of 200 presently existing chapters of Fraternal Order of Police, and upon its determination depends the question of the expansion of this Fraternal Order, with all the demonstrated benefits to police work. Not only are present members affected, but the interests of every law enforcement officer everywhere is involved, as well as the administrative officials, on the question of the existence of the right of peaceful assembly and guarantees under the Fourteenth Amendment.

It was said in *Hague v. C.I.O.*, 59 S. Ct. 954, 207 U. S. 496, 83 L. Ed. 1423:

> "We granted certiorari as the case presents important questions in respect of the asserted priv-

ilege and immunity of citizens of the United States to advocate action pursuant to a federal statute, by distribution of printed matter and oral discussion in peaceable assembly; and the jurisdiction of federal courts of suits to restrain the abridgment of such privilege and immunity."

Hague v. C.I.O., 59 St. Ct. 954, 307 U. S. 496, 83 L. Ed. 1423.

VI.

ARGUMENT

A. THE ORDER AND ACTS COMPLAINED OF DEPRIVED PETITIONERS OF THEIR RIGHT TO PEACEABLY ASSEMBLE, THEIR EQUAL PRIVILEGES AND IMMUNITIES, AND TOOK PROPERTY WITHOUT DUE PROCESS OF LAW, ALL CONTRARY TO THE FOURTEENTH AMENDMENT.

(a) The administrative order complained of was void, and the acts of the defendants pursuant thereto were legally unjustifiable.

1. There was only one single administrative order in the Detroit Police Department which specifically prohibited membership in Fraternal Order of Police. That was the 24-year old order of Commissioner Inches. At the time this controversy arose, this order was so old that the Department as a whole, knew nothing about it. It was issued at least 4 years before Heine was a member of the Police Department, and 15 years before Duggan became a police officer.

Very definitely neither of them knew of this order when they sought to become active in this Fraternal Order of Police. It is undoubtedly true that both knew that there were many organizations which they must not join, and both undoubtedly expected opposition to their activities in this one, and both originally expected to go to their superiors and ask permission. Only the precipitate action of the officials themselves prevented.

But neither one of the individual petitioners knew of any specific orders prohibiting Fraternal Order of Police.

Nor was there any other restraint on joining organizations save in the rules of the Department, and the oath taken by all police officers.

2. Twice after Commissioner Inches' order, successive Commissioners had issued communications relative to the restraints on Police Officers from joining organizations. In neither was there any mention made of the Inches' Order. Both placed the restraints right where they really resided—in the rules of the Department, and the oath which all officers took. On March 30, 1932, the then Commissioner Watkins had said in an order (R. 247):

> "The limitations on the membership of the Department rule to joining organizations are contained in the oath and in Section 124 of the Detroit Police Manual."

Again, on May 26, 1936 the then Commissioner Pickert said in a general communication "To all members of the Department" (R. 62-63):

> "Your attention is called to Section 124 of the General Rules in the Detroit Police Manual, which reads as follows:
>
> 'Prior Claim on Police Duty. A member of the Department is prohibited from affiliating with any organization or body, the provisions of the constitution of which would in any way exact prior consideration and prevent him from performing police duty.'
>
> The oath you took at the time of your appointment reads as follows:
>
> 'I (repeat your name) do solemnly swear that I will support the constitution of the United States, the Constitution of the State of Michigan, obey the rules and regulations of the Detroit Police Department, and faithfully perform the duties of a police-

> man, and that I will not be or become a member of any organization whatever which is affiliated with any organization which holds or claims or exercises the right to demand obedience of me or to direct me to disobey a rule of the Detroit Police Department, so help me God.'
>
> Any member belonging to organizations in conflict with the above shall immediately sever all connections."

Thus the only real restraint on police officers from activity in any organization was against affiliating with any that would in any way "exact prior consideration and prevent him from performing police duties," as provided in Section 24 of the Rules, and "which holds or claims or exercises the right to demand obedience * * * or direct * * * to disobey a rule of the Detroit Police Department * * *," as provided in the oath.

We think there was in force no other restraint, and that neither Heine or Duggan violated these.

At any rate, the ancient order of Commissioner Inches had been forgotten, and definitely was not in force, by the terms of the two subsequent orders of successive police commissioners.

3. However, the present Commissioner, after this controversy arose, on February 3, 1943, in a general communication, Order No. 561, stated that: "This order * * * is in full force and effect at this time," referring to the Inches Order. While this was after Heine and Duggan had become involved with Fraternal Order of Police, their continuance in their relationship with that Fraternal Order may raise the question of the validity of that Departmental order.

At least it is only on this tenuous line that any consideration of that order may enter into this controversy.

4. It is definitely our position that this order is unreasonable, and that it is arbitrary, capricious and fanciful, therefore void, and that its enforcement, by discharging Heine and Duggan, and its repromulgation, deprived petitioners of their constitutional rights as claimed herein.

(b) The Inches order is unreasonable and is therefore void.

1. An administrative order, to be reasonable, must be based upon some reason, or upon some fact. If it is wholly without reason, and utterly contrary to demonstrated facts, it must necessarily be unreasonable, capricious, fanciful and therefore void.

2. Many pages of the record are filled with testimony of high police officials which shows conclusively that Fraternal Order of Police so far from being inimical to police work is of tremendous benefit, that it conducts educational programs in police work, institutes programs to combat juvenile delinquencies, contributes to charity, engages in Liberty Bond Drives, and provides social life and recreation for its members (R. 224-226). J. Edgar Hoover is favorably disposed toward it (R. 26). The head of Michigan State Police belongs to it, and is a member of an important committee (R. 96). There are 200 chapters in 17 states and Detroit is literally surrounded with chapters. Chapters are in all the larger cities of Michigan, and the record conclusively establishes that the police morale is lifted, and that the benefits are great. A justice of the Michigan Supreme Court and the State Treasurer are honorary members.

The Police Commissioner charged that it was a Labor Union, and that its chief function was to raise money, and that it had honorary members and made use of automobile emblems.

These things are nowhere based upon any evidence at all. The Local Chapter, Victory Lodge No. 115, out of deference to Police Officials' objections, provided in their constitution against having honorary members and automobile emblems.

Being based upon no facts at all, and being contrary to established facts, it seems clear that the order and acts complained of are unreasonable, arbitrary, capricious and therefore void.

3. Nor did the Commissioner make any investigation before taking the position which he did, before instituting the action complained of. Had he done so we feel that a different situation would have presented itself.

He knew nothing at all about Fraternal Order of Police except that early in his occupancy of his office the Commissioner had seen in the file Inches' old order, had talked with Police Officers about it, but to what extent we do not know, and had some letters relating to a few minor instances when members in other places had run afoul of the rules of good police conduct.

He knew nothing at all of the growth and extent of Fraternal Order of Police, and never knew of any attempt to organize in Detroit until the next day after the dinner party, when he read the newspaper account.

Upon this complete lack of knowledge of anything except what had occurred 24 years before, he revived the Inches Order, the discharges of Heine and Duggan were caused, and other methods used to frustrate the organization of a Chapter in the Detroit Police Department.

We submit that this was unreasonable, and therefore void.

4. Much is said in this case about the police department being a "Quasi-Military" organization. Of course there is no more reason for calling it a quasi-military than calling it quasi civilian. It is much more civilian than military, for the men do not live in camps, they have regular hours, on and off duty, except in emergencies, they do not rise or go to bed at bugle call, but live in homes with wives and families like other civilians.

But let us suppose that this Police Department is a purely military organization.

Even so, there exists no duty to obey an unlawful order. Consequently, failure to obey such order cannot give rise to a charge of disobedience or insubordination.

There is no military law that is not derived from the constitution. See the extremely well-considered decision in *Ex Parte Milligan,* 4 Wall, (U. S.) 2, 18 L. Ed. 281, and United States Constitution, Article I, Section (a), Article II, Section 1, Amendment 5.

And nothing is better settled than neither officers nor soldiers are bound to obey an illegal order.

It was said in *State v. Sparks,* 27 Tex. 627, 632:

> "There is nothing better settled, as well by the military as the civil law, than that neither officers nor soldiers are bound to obey any illegal order of their superior officers; but, on the contrary, it is their bounden duty to disobey them. The soldier is still a citizen, and as such is always amenable to the civil authority * * * While an officer must not obey an unlawful order of his superior in command, yet, as in all cases where he declines obedience to it he acts at his peril, such indulgence should be shown in extenuation of his obedience to such orders from those he is ordinarily bound to obey."

State v. Sparks, 27 Tex. 627, 632.

In *Riggs v. State,* 3 Coldw. (Tenn.) 85, 9 Am. Dec. 272, 273:

> "It is a well settled principle, a soldier is not bound to obey any unlawful order."
>
> *Riggs v. State,* 3 Coldw. (Tenn.) 85, 9 Am. Dec. 272, 273.

See also:

> *United States v. Carr,* 225 F. Cas. No. 14732; 1 Woods 480;
> *Mitchell v. Harmony,* 3 How. 129;
> *Moscwin v. Fabigan,* 1 Cowp. 180."

5. It seems to us that the higher police officials, like the rank and file, are bound by regular established departmental rules. It would hardly seem that a Departmental order in excess of or in violation of established rules is reasonable or valid. Yet, it is definitely clear that membership in this organization is in no sense prohibited by the rule above quoted or the oath heretofore referred to.

6. The Supreme Court of Michigan in its opinion (*State Lodge v. City of Detroit,* 318 Mich. 182, on pages 188 and 189) implies, in contradiction of the Exhibit itself, that the Local Chapter, Victory Lodge 115, had not prohibited Associate memberships and car emblems in its constitution. Yet the Constitution was before that court. It cannot be questioned. Allusion is made to Duggan's statement when interrogated by his superiors, "that they have what is called Associate Members." This of course does not prove that the provision is not in the Constitution of the Local Lodge, because some other lodges do have Associate Members. And indeed the Constitution may not have been formed at that time, or Duggan may not have known it.

But in any event, it is idle to claim that the Constitutional provision does not exist, when there it is in the Exhibit itself for all to read (R. 82, 83, Ex. 3).

7. On page 185 of its opinion the Supreme Court of Michigan said that the Police Commissioner, "had occasion to investigate the Fraternal Order of Police."

In the next sentence it gives as a detail of the investigation:

> "He examined the file in his office respecting the plaintiff order and discussed the file with Officers in the City of Detroit Police Department and with police officers in other police departments."

This is exactly what we claim. There was no investigation at all. The Commissioner looked at the file giving 24-year old information and talked with a few persons, and instituted his arbitrary action on this meager and antiquated information.

Clearly this is unreasonable.

In summary, we are sure that the action of the defendants in reviving the 24 year old order of Commissioner Inches, and in enforcing it and claiming that Heine and Duggan had violated it, and forcing their discharge on that basis under a claim of insubordination, is unreasonable, arbitrary, capricious and therefore void.

It seems to us equally clear that defendants' acts based upon this void order, deprives petitioners of their constitutional rights.

We shall proceed to a discussion of these points.

(c) Petitioners are deprived of their right to peaceably assemble.

The right to peaceably assemble is not founded in any Constitutional provision, but existed prior thereto, and the first amendment but prohibits Congress from abridgment thereof. *United States v. Cruikshank,* 92 U. S. 552, 23 Law Ed. 588.

The State Constitutions are commonly framed so as to secure this right to their people, and the Michigan Constitution, Article II, Section 2, provides:

> "The People have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the legislature for redress of grievances."

This Michigan Constitutional provision standing alone of course presents no Federal question, but this court has clearly held that the right of peaceable assembly is secured by the 14th Amendment to the United States Constitution. *Douglas v. City of Jeannette,* 63 Sup. Ct. 877; 319 U. S. 157; rehearing denied, 63 S. Ct. 1170; *State v. Barlow,* 153 P. (2) 647, 107 Utah 292, appeal denied, 65 Sup. Ct. 916, 324 U. S. 829, rehearing denied, 65 S. Ct. 1026, 324 U. S. 891, and see decisions hereinafter quoted.

This right to peaceably assemble is secured to "The People." There is no exception made of policemen. The right of course is not without reservation, but it is, we think, self-evident that no restriction can go so far as to prohibit peaceable assembly based upon an unreasonable and void administrative order.

It is not so very long ago that even workmen could not "peaceably assemble"—they could not form labor unions for that was in early times considered a criminal conspiracy. The courts have lifted that odious ban. More recently

again foremen were in the same way prohibited from peaceable assembly, until this court by its decision lifted that ban.

We say definitely that policemen should be finally freed from arbitrary administrative orders that prohibit them from assembling for mutual good—for purposes in no wise inimical to their required devotion to police duties.

We ask no other decision from this court.

It is as simple and self evident as that.

The principle here sought to be invoked has several times been announced by this court and other courts.

In *Thomas v. Collins, 65 Sup. Ct. 315, 323 U. S. 516, 89 Law Ed. 430,* rehearing denied, 65 S. Ct. 557, 323 U. S. 819, 89 Law Ed. 630, the State of Texas had a statute requiring registration of labor organizations before they could solicit membership in a union. Thomas, without registering, made a speech, at an assembly, soliciting memberships. He was convicted and sentenced by a Justice of the Peace. He was also adjudged in contempt of court for violation of an injunction that had been issued. The Texas Appellate Court refused to release him on Habeas Corpus proceedings, and an appeal was taken to this court. There are several concurring opinions in that decision, that of Mr. Justice Rutledge concurred in by a majority of the other Justices, saying as follows:

> "The case confronts us again with the duty our system places on this court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. *Cf. Schneider v. State,* 308 U.

S. 147; *Cantwell v. Connecticut*, 310 U. S. 296, *Prince v. Massachusetts*, 321 U. S. 158. That priority gives these liberties a sanctity and a *sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.* Compare *United States v. Carolene Products Co.* 304 U. S. 144, 152-153.

"*For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.* The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. *Only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.* It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. *It was not by accident or coincidence that the rights to freedom of speech and press were coupled in a single guaranty with the rights of the people peaceably to assembly and to petition for redress of grievances.* All these, though not identical, are inseparable. They are cognate rights, of *DeJonge v. Oregon*, 299 U. S. 353, 364, and therefore are united in the First Article's Assurance. *Cf 1 Annals of Congress* 759-760.

* * * * *

"The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones.

And the rights of free speech and a free press are not confined to any field of human interest."

* * * * *

"That the state has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted. They cannot claim special immunity from regulation. *Such regulation however, whether aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly.* This court has recognized that 'in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution . . . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.' *Thornhill v. Alabama,* 310 U. S. 88, 102-103; *Senn v. Tile Layers Protective Union,* 301 U. S. 468, 478. *The right thus to discuss and inform* people concerning the advantages and disadvantages of unions *and joining them* is protected not only as part of free speech, *but as part of free assembly. Hague v. C. I. O.* 307 U. S. 496. The Texas court in its disposition of the cause, did not give sufficient weight to this consideration, more particularly by its failure to take account of the blanketing effect of the prohibition's present application upon public discussion *and also of the bearing of the clear and present danger test in these circumstances.*"

* * * * *

"As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave

and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others."

* * * * *

"If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. *So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction.* If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." (Italics ours.)

Thomas v. Collins, Sheriff, 65 S. Ct. 315, 323 U. S. 516; 89 Law Ed. 430; rehearing denied, 65 S. Ct. 557, 323 U. S. 819, 89 Law Ed. 630.

These principles were announced again in a District Court of California, in *U. S. v. Korner, 56 F. Supp. 242.* In that case it was sought to cancel Korner's citizenship which had been acquired by naturalization, on the ground of fraud in his application for citizenship. He had alleged

in his application that he adhered to and believed in the United States Constitution and form of government, while in truth and in fact he belonged at that time to the German-American Bund, and believed in the Hitler System. The court said in denying cancellation of his citizenship:

> "It must be regarded as settled that each liberty specified in the First Amendment of the Constitution is a liberty which is secured by the due process clause of the Fifth Amendment to all persons without regard to citizenship."
>
> * * * * *
>
> "The next proposition is to determine the extent of the liberties of the First Amendment. In that connection it must be regarded as also settled that the liberties of the First Amendment are not absolute liberties, but are subject to a limited restraint. *But such restraint 'is tolerated by our Consttiution only' under what has now come to be known as the 'clear and present danger' rule.*
>
> "The 'clear and present danger' rule is a broad rule, as it necessarily must be. Being broad it cannot and should not be compressed into the narrow confines of a single statement of it or captured in a formula. But the rule has been before the courts often enough that while a standard has not been fixed 'by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present.' Nevertheless, it has been so variously stated that guides now exist for testing restraints on what is called the 'Minimum compulsion of the Bill of Rights.'
>
> In *Bridges v. State of California,* 314 U. S. 252, at page 263, 62 S. Ct. 190, at page 194, 86 L. Ed. 192, the court said:
>
> "'What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and

the degree of imminence extremely high before utterances can be punished. *Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than organize a minimum compulsion of the bill of rights.* For the first Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press. *It must be taken as a command of the broadest scope that explicit language read in the context of a liberty-loving society will allow.*" '

"The fact that the exercise of a liberty of the First Amendment is likely to result in some violence is not enough to justify its suppression. *There must be the probability of serious injury to the state.* Advocacy of ideas or action however reprehensible, is not a justification for denying free speech, where the advocacy falls short of incitement, or where there is no exhortation to immediate violence or to crime or other unlawful means, and there is nothing to indicate that the advocacy must be immediately acted on. *In order to support a finding of clear and present danger it must be shown either that the immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.* These are some the guides which are set out in the concurring opinion of Justice Brandeis in the Whitney case, *supra,* and now accepted as settled.

"*Freedom of thought, speech, and assembly is the rule; Abridgment of that freedom is the exception.*"

* * * * *

"It is implicit in the Constitution that a Nation which is strong enough to proclaim the individual liberties of the First Amendment is strong enough to apply and enforce and preserve them. The history of this nation is the history of their application and preservation. It has demonstrated that they

are strong enough to endure both war and peace. They not only survived through the various wars of this Nation, but, after the worst kind of all wars where brother is set against brother in a fratricidal civil war, their guarantees were extended as prohibitions against the several states by the due process clause of the Fourteenth Amendment, whereas before, the forbidance was against the National Government only. *During peace times they have survived innumerable ingenious schemes by public bodies and officials, as well as by private organizations, for their restriction or abridgment in zealous efforts to by-pass or ignore them.*

"In its finality, this action seeks to penalize the defendant on the ground the defendant was not 'attached to the principles of the Constitution' because he exercised the rights guaranteed to individuals in the declaration of those principles. In the midst of this war to preserve the liberties set out in those principles, *it would be strange indeed to deny them to a man for their exercise when we were not then at war and under conditions where no clear and present danger is alleged to have existed.*

"Whatever attitude we may individually hold toward persons and organizations that believe in or advocate extensive changes in our existing order, it should be our desire and concern at all times to uphold the right of free discussion and free thinking to which we as a people claim primary attachment. To neglect this duty in a proceeding in which we are called upon to judge whether a particular individual has failed to manifest attachment to the Constitution would be ironical indeed." *Schneiderman v. United States,* 320 U. S. 118, at page 139, 63 S. Ct. 1333, at page 1343, 87 L. Ed. 1796." (Italics ours.)

U. S. v. Korner, 56 Fed. Supp. 242.

See also:

N. L. R. B. v. American Pearl Button Co., 149 Fed. (2) 311.

Douglas v. Jeannette, 63 S. Ct. 877, 319 U. S. 157, rehearing denied, 63 S. Ct. 1170.

Freedom of assembly in the rule. Abridgment of that freedom is the exception. Surely there is nothing in this case which establishes "a clear and present danger" which would operate to remove these police officers and the Fraternal Order of which they are members, from the Constitutionally guaranteed right of freedom of assembly.

(d) Petitioner's property has been taken without due process of law, and their privileges and immunities as citizens of the United States, violated, contrary to the 14th Amendment.

We discuss the application of the equal privileges and immunities clause, and the due process of law clause of the 14th amendment together, largely because the decisions of this court and other courts do so.

It is our position that the equal protection and immunities clause secure to those of the petitioners who are natural persons the right of peaceful assembly as citizens of the United States, and that the due process clause secures them to everybody.

In *Hague v. C.I.O.,* 59 Sup. Ct. 954, 307 U. S. 496, 83 L. Ed. 1423, plaintiffs below, being individuals, and an unincorporated labor union and a corporation, brought injunction proceedings against the officials of the city to restrain them from enforcing an ordinance provided that meetings might not be held without a permit, that none could be held to advocate to overthrow the government. It was complained that plaintiffs had been denied the privilege of meeting on the ground that they were Communists and also destruction of books, pamphlets etc., had been presented and punished. This court in holding

that injunction should be allowed, said in the majority opinion:

> "Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against State abridgment, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, *is a privilege* inherent in citizenship of the United States which the amendment protects.
>
> "In the Slaughter-House cases it was said, *16 Wall.* 79: 'The right to peaceably assemble and petition for redress of grievances, the privilege of the Writ of Habeas Corpus, are rights of the citizen guaranteed by the Federal Constitution.'
>
> In *United States v. Cruikshank,* 92 U. S. 542, 552-553, the court said:
>
> 'The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States.'
>
> No expression of a contrary view has ever been voiced by this court."

* * * * *

"Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages and opportunities to accrue to citizens therefrom. All of the respondents' proscribed activities had this single end and aim. The District Court had jurisdiction under Sec. 24 (14).

"Natural persons, and they alone are entitled to the privileges and immunities which Sec. 1 of the Fourteenth Amendment secures for 'citizens of the United States.' Only the individual respondents may, therefore, maintain this suit." (Italics ours.)

Hague v. C.I.O., 59 Sup. Ct. 954, 307 U. S. 496; 83 L. Ed. 1423.

In *DeJonge v. State of Oregon*, 57 S. Ct. 255, 299 U. S. 353, 81 Law Ed. 278, defendant had been convicted in a state court for a criminal syndicalism, which conviction the Supreme Court of that state affirmed. The facts show that he had assisted in the conduct of a meeting under the auspices of the Communist Party, and that this party taught criminal syndicalism contrary to the Oregon Statute. On appeal to this court, the conviction was reversed, the opinion saying:

"Freedom of speech and of the press are fundamental rights which are *safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. Gitlow v. New York, supra,* p. 666; *Stromberg v. California, supra,* p. 368; *Near v. Minnesota,* 283 U. S. 697, 707; *Grosjean v. American Press Co.,* 297 U. S. 233, 243, 244. The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."

* * * * *

"These rights may be abused by using speech or press or assembly in order to incite to violence and

crime. The people through their legislatures may protect themselves against that abuse. *But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.* The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the Will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

"It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. *The holding of meetings for peaceable political action cannot be proscribed.* Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting in held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of

valid laws. But it is a different matter when the state, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

We are not called upon to review the findings of the state court as to the objectives of the Communist Party. *Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a large purpose, although called by that party.* The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty.

We hold that the Oregon statute as applied to the particular charge as defined by the state court is repugnant to the due process clause of the 14th amendment. The judgment of conviction is reversed and the cause is remanded for further proceedings not inconsistent with this opinion." (Italics ours.)

DeJonge v. State of Oregon, 57 S. Ct. 255; 299 U. S. 353; 81 Law Ed. 278.

See also: *Ghadiali v. Delaware State Medical Society*, 28 Fed. Supp. 841.

These decisions clearly establish that the right of assembly is protected by the due process clause, and as to citizens who are natural persons, probably by the equal privileges and immunities clause also, of the 14th amendment.

In the instant case by the acts of the Administrative officers of the city of Detroit, individual petitioners have been deprived of their jobs as police officers, and the Fraternal Order itself of its right to assemble and hold meetings, and all of the petitioners of their right to peaceably

assemble as that term is used in the Constitution. This was done under the cover of a void administrative order 24 years old, and revived at the time of the controversy without any investigation of the circumstances which had changed in a quarter of a century.

It is not our contention that the right to assemble is absolute. But it is our contention that police officers are not excluded from the constitutional protections, and that any such exclusion is the exception and not the rule, and that there is no clear and present danger for which an exception can be based. It is our contention that the 14th Amendment guarantees freedom of assembly to these police officers and to the Fraternal Order of which they are members, unless a clear and present danger is shown. And it is further our contention that no such danger is shown, for the record is conclusive, that Fraternal Order of Police is in no sense inimical to police work, but on the contrary is highly beneficial thereto.

VII.

RELIEF SOUGHT

We respectfully ask that the Writ of Certiorari issue to the Supreme Court of the State of Michigan as prayed in the petition.

Respectfully submitted,

EDWARD N, BARNARD,
Attorney for Petitioners.

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OCT 24 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 372

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, by its President, Henry Mida, Lodge No. 115 of the State Lodge, HOWARD HEINE and BERNARD L. DUGGAN,
Plaintiffs, Appellants and Petitioners,

vs.

CITY OF DETROIT, a Municipal Corporation, EDWARD J. JEFFRIES, Mayor of the City of Detroit, JOHN H. WITHERSPOON, Commissioner of Police of the City of Detroit, County of Wayne and State of Michigan,
Defendants, Appellees and Respondents

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF FACTS

Respondents have filed a brief in opposition to the issuance of a writ of certiorari, to which we wish to make reply.

We shall not burden the court with any controversy over respondent's accusation that the facts are not accurately stated in our primary brief, other than to say that we believe they are therein accurately stated, with record references.

We believe that the *essential* facts stand out clearly in the petition and brief filed, free from any controversy.

We confine ourselves in this brief to the point raised in respondent's brief as to whether or not a federal question is presented.

II.

ARGUMENT

A. A FEDERAL QUESTION IS PRESENTED

The 24 year old order of the former Police Commissioner Inches forbidding membership in F. O. P., revived by the present Commissioner after this controversy had jelled, is of course the basis of petitioners' grievance. There are two aspects to the question:

1. Are petitioners' constitutional rights invaded if the order is void?

We claim definitely that they are.

2. Are petitioners' constitutional rights invaded if the order is valid, other than being in conflict with the constitutional provisions invoked?

With equal definiteness we claim that they are.

It is perhaps unnecessary to recall to the court that we claim violation of certain constitutional rights, particularly the right of assembly, as guaranteed by the First and Fourteenth Amendments. If the record does present these questions, we take it that it needs no argument that a federal question is involved and that a writ ought to issue.

(a) It would seem to admit of no denial that petitioners' right of assembly is invaded if police officers are discharged from the police department of a municipality for violation of a void administrative order, such as the one in question which purports to prohibit membership in a fraternal order.

It was our basic contention in the court below that this order was void. Our position is outlined on pages 21-28 of

our primary brief and will not be here repeated. Upon review, the question would be whether or not the order is void, and if found to be void, the application of the constitutional provisions invoked would follow as a matter of course.

It seems to us that this presents a meritorious question. That it is a federal question, involving the right of assembly, it seems to us admits of no doubt.

Incidental to this point, and raised by respondent's brief, they still urge that the Commissioner made an investigation before he revived the old Inches order. Counsel, as heretofore, states on page 14 of his brief that such investigation was proved in testimony taken before Judge Keidan, a Judge in the trial court, on an interlocutory proceeding long prior to the trial. This testimony, however, is no part of the record—it was offered twice and rejected by the trial court twice (R. 505-6). The opinion of Judge Keidan attached to respondents' answer is a part of this, and is no part of the record now before the Court.

Lack of investigation on the part of the Commissioner before re-promulgating the Inches order, and enforcing it, has always been one of the reasons we have urged in charging that the order was unreasonable and therefore void.

Again, counsel for respondent calls attention to a former proceeding when Fraternal Order of Police was a plaintiff, but against entirely different defendants,—the Police Governing Board of the City of Lansing. The Michigan Supreme Court opinion is in *Fraternal Order of Police, et al., v. Harris, et al.,* 306 Mich. 68, 10 N. W. 2d 310, petition for certiorari denied 321 U. S. 784, 74 S. Ct. 781, 81 L. Ed. 1076.

But counsel, himself, points out (respondents' brief, page 9) that, "The Lansing case differs from the Detroit case," and points out two differences. However, the great-

est difference of all is the fact *that in this court we did not urge violation of the right of assembly as we do in the present case.*

Entirely different issues were presented, and we are therefore in nowise barred by the former case. It was a separate proceeding, between different parties, presenting different issues, and different counsel represented F. O. P. in the trial court.

We quote from the respondents' brief in that case, when application was made to this court for the issuance of a writ of certiorari, on page 2:

> "The Board has not determined that policemen may not join the Fraternal Order of Police, but that a superior officer may not join, fearing evidently that such association would hinder officers in their duties and render discipline by them ineffective or impossible. It should be borne in mind that no superior officer is here complaining nor is any person objecting that he is being denied associate or honorary membership. As the trial Court said 'None of the individuals affected is a party to the action' (R. 48.)"

Again, respondent's brief says, on page 5:

> "Petitioners claim invasion of their rights under the equal protection and due process clause of the 14th Amendment. The grounds for appeal from the trial Court to the Michigan Supreme Court did not raise these constitutional questions (R. 15). The trial Court held there was no constitutional questions involved but, 'rather the proposition here involved is solely of departmental discipline' (R. 51). The Supreme Court's opinion did not discuss the constitutional question, apparently considering it was not involved."

Then it is clear that that case did not present the right of a police officer to become a member of F. O. P., and the constitutional right of assembly was not involved. Reference to the petition and briefs in that case will so further disclose.

Consequently, we say that this present case, for the first time so far as we know, presents the distinctly federal question as to whether or not a police officer may be penalized by being deprived of his job for violating a void administrative order prohibiting him from joining an organization designed for the mutual good of law enforcement officers.

(b) But we are equally sure that a federal question is presented even if the order prohibiting membership is not void, except as it comes into collision with the constitutional provisions invoked.

We have heretofore urged that the order is void because it was made without investigating as to the real character of the F. O. P., that it was based on no factual situation, but it was contrary to existing facts, and the F. O. P. is in fact a well established fraternal organization designed for the mutual good of law enforcement officers, and helpful to police work, wherefore an order prohibiting membership therein is unreasonable.

But at this point we go a step further.

Even if the Commissioner had full power otherwise to make and enforce this order, yet it deprives petitioners of their constitutional rights of assembly, and is therefore void.

The constitutional protection envelops everyone. Police officers are not excepted. While counsel asserts that the "clear and present danger" rule does not apply, we find in his brief no convincing reason why not. To assert that

petitioner—individual petitioners at least—police officers, are a class "apart" from others, is not enough. They are not so far apart as to be removed from constitutional protection.

Had there been any showing in the record of any clear and present danger, then there might have been some force to the argument. Surely no one anywhere can be divested of his constitutional protection in the exercise of any constitutional right, unless its exercise is attendant with some danger of some kind to someone else.

III.

CONCLUSION

We feel that a federal question is clearly presented, particularly as to whether or not the petitioners' right of assembly is invaded under the First and Fourteenth Amendments.

We claim (1) the order of the Police Commissioner prohibiting membership is void, whence certainly the imposition of any penalty for its violation clearly violated the constitutional provisions invoked; and (2) even if otherwise valid, the order is void because it violates the constitutional right of assembly, because no danger "clear and present" is attendant upon the exercise of the right of assembly on the part of free police officers.

So far as we know the question has not been determined by this court. It was not an issue in *F. O. P. v. Harris,* where certiorari was denied 321 U. S. 724, 74 S. Ct. 781, 88 L. Ed. 1076, so this court's action in that case is no bar.

The bald question presented is :

> May a law enforcement officer become a member of an organization designed for the mutual good of all

law enforcement officers despite an order of his superior prohibiting him from so doing, whether or not that order is void other than being in conflict with the constitutional provisions invoked?

We claim that he may.

We ask that the writ issue as prayed.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 372

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, by its President, Henry Mida, Lodge No. 115 of the State Lodge, HOWARD HEINE and BERNARD L. DUGGAN,
Plaintiffs, Appellants and Petitioners,

vs.

CITY OF DETROIT, a Municipal Corporation, EDWARD J. JEFFRIES, Mayor of the City of Detroit, JOHN H. WITHERSPOON, Commissioner of Police of the City of Detroit, County of Wayne and State of Michigan, LOUIS L. BERG, Superintendent of Police of the City of Detroit, County of Wayne and State of Michigan,
Defendants, Appellees and Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

PRELIMINARY STATEMENT

This is petitioners' second attempt to obtain a writ of certiorari in the United States Supreme Court to review the action of the Michigan Supreme Court sustaining the validity of a rule prohibiting membership by police officers

> The power in the city of complete control is imperatively necessary if discipline is to be maintained.' "

Many other inaccuracies in Petitioners' Statement of Facts could be detailed. We, therefore, believe that in fairness to the Court we should present a counter-statement of facts amply supported by the testimony and proofs offered in the case and sustained by the findings of fact contained in the opinions of the Trial Judge and the Michigan Supreme Court.

II.

COUNTER-STATEMENT OF FACTS

NOTE: The record on appeal consists of three volumes including Volumes I and II of Exhibits and unless otherwise clearly shown by the context, figures in parentheses refer to pages of the printed record.

The defendant, John H. Witherspoon, became Commissioner of the Detroit Police Department on June 1st, 1942. He soon thereafter learned of the existence of an Order issued June 5th, 1919, by former Commissioner Inches, prohibiting membership by police officers in the Fraternal Order of Police. He had occasion to discuss the Order with a number of his Commanding Officers and members of other Police Departments (380) and he also examined the contents of the F.O.P. file which was then in the Police Department (379). He did not in any way abrogate or modify the prohibitory Order.

On Thursday, January 28th, 1943, a group of Detroit police officers, under the leadership of Patrolman Howard Heine and Detective Bernard L. Duggan, arranged a dinner meeting at the Wardell-Sheraton Hotel, Detroit (99, Ex. Vol. II, p. 51). The meeting was attended by a number of police officers and some representatives of the Ham-

tramck, Michigan, Lodge of the F.O.P., the plaintiff, together with Henry Mida of the Dearborn Police Department, and President of the State Lodge F.O.P. (Ex. Vol. I, p. 298), and Ralph Nelson, a reporter of the Detroit Free Press (Ex. Vol. I, p. 304). The meeting was addressed by Mida, who as State President, told of the advantages of membership in the F.O.P. and urged the men to organize a Detroit Police Lodge (371, Ex. Vol. II, 51-52). A temporary organization was set up with Heine as temporary President and Duggan as temporary Secretary (Ex. Vol. II, 56, 300). The meeting attracted considerable public attention. On Friday, January 29th, Superintendent Berg was informed by a newspaper reporter that the F.O.P. was organizing the Police Department and he immediately notified the Commissioner (Ex. Vol. I, p. 68). They learned more about the organization from an article which appeared in the Detroit Free Press Friday night, January 29th. The article recited, among other things, the following:

> "In a five and one-half hour session held Thursday night behind closed doors in the Wardell Sheraton Hotel, Detroit Police Officers signified their intention of joining the National Order despite any possible executive or administrative protests."

Neither Commissioner Witherspoon nor Superintendent Berg knew anything about the efforts to organize the F.O.P. Lodge until the Superintendent receive the phone call from the newspaper reporter and they read the article in the Free Press.

Heine was summoned to Police Headquarters on Saturday morning, January 30th, and a meeting was had between him, Commissioner Witherspoon and Superintendent Berg (Ex. Vol. I, p. 310). A transcript of this meeting was received in evidence (Ex. 139, Ex. Vol. II, pp.

46-80). Heine related the circumstances surrounding the Thursday meeting but denied that he knew of the existence of the Inches' Order prohibiting membership in the F.O.P. until informed of its existence at this meeting (Ex. Vol. II, p. 66; Ex. Vol. I, p. 310). He admitted that he had been advised that the formation of the organization was contrary to the Orders of the Police Department (Vol. II, p. 61) but that he allowed himself to be elected President (Ex. Vol. II, p. 61). Heine was given the Inches' Order to read and he then informed the Commissioner that if the F.O.P. was permitted to organize in the Police Department he would join, but if not, he would not join and that he would pull out of the organization (Vol. II, 68-69). He also advised that no new meeting was contemplated and that the organization intended to present the matter to the Commissioner for permission to organize (Ex. Vol. II, 71).

Notwithstanding his statement to the Commissioner and Superintendent, that no further meetings were contemplated until the matter could be presented to the Commissioner, Heine left Detroit Police Headquarters and went directly to the Eagles Hall in Detroit (Ex. Vol. I, p. 312) where a secret organization initiation and election meeting was held (Ex. Vol. I, p. 313; Vol. II, 12). Heine was elected permanent President (Ex. Vol. I, p. 316) and Duggan Secretary (83).

On Monday, February 1st, 1943, Duggan was summoned to Police Headquarters where he was interviewed by Commissioner Witherspoon. A transcript of the meeting was received in evidence (Ex. 130, Ex. Vol. II, pp. 11-46). Duggan refused to reveal any information relative to the meeting held on January 28th, on the ground that the meeting was a secret meeting (Vol. II, 17-20). He knew of the rule prohibiting membership in the F.O.P. (Vol.

II, 22-23), but he joined nevertheless because he figured the rule was wrong and he was willing to be the guinea pig in a test case (Vol. II, 23-24). He admitted being on duty from eight to four that day and attending the meeting at three o'clock without permission to leave his work earlier (Vol. II, p. 44-46).

On February 2, 1943, misconduct charges were preferred against Heine, charging disobedience of rules and order of the Department; reporting falsely to a superior officer and insubordination. On the same day similar charges were preferred against Duggan, with the additional charge of being absent without leave. Both officers were ordered to appear before the Police Trial Board on February 5, 1943, to answer the charges (23-29).

The trial of Heine was held on February 5th, 1943, and that of Duggan was held on February 6th, 1943. At the trial of Heine Patrolman William Galahn testified (Exhibit 128, 95 through 128) that he was one of the officers that attended the January 28th, 1943 dinner, at which time he was elected temporary treasurer. He testified that he knew that Heine was to meet with Superintendent Berg on Saturday morning, January 30th, relative to the organization; that he went to the meeting to ascertain the result of Heine's conference with the Superintendent and "to find out if the organization had secured permission to start;" that Heine told Galahn: "He didn't tell me he had direct permission but he thought it would be permissible for him to go ahead; that he thought the way things looked, the Superintendent was going to give us an O. K." (Ex. 128, p. 99). Galahn testified further as follows:

> "Q. Now if Heine had told you he had received no permission but on the contrary was told that the organization was against the rules of the Depart-

ment * * * would you have joined the organization?

A. I would not" (Exhibit 128, 104 and 104-A).

At the hearings before the Trial Board neither Heine nor Duggan took the stand to offer any testimony in their own defense, nor did either one of them offer to withdraw from the Fraternal Order of Police. The findings of the Trial Board are contained on pages 121 through 124 of Exhibit 129.

The proofs were conclusive that both Heine and Duggan were guilty of flagrant insubordination. On Saturday morning, January 30th, 1943, Heine told the Commissioner and the Superintendent that no further meetings of the F.O.P. were contemplated while there was an Order in the Department prohibiting membership in the organization, and that nothing further would be done until the matter could be presented to the Commissioner in an orderly fashion for a change in the rule. Notwithstanding this conversation, Heine left police headquarters and went directly to the organization meeting of the local F.O.P., permitting himself to be initiated and elected permanent President, and when Patrolman Galahn asked Heine about the Saturday morning meeting with the Superintendent, he, Heine, told him everything was O. K. and that they were going to get permission to organize.

Duggan, who had been elected Secretary at the meeting of January 30th, 1943, was brought before the Commissioner the next Monday, on February 1st, 1943; he told the Commissioner that he believed the rule was wrong and that he was going to remain a member notwithstanding the rule. He made no effort to justify his conduct in leaving his duty and attending the meeting of the organization.

Both officers were found guilty of insubordination and dismissed from the Department.

On February 3rd, 1943, Commissioner Witherspoon promulgated Order No. 561 reaffirming the Inches' Order of 1919 prohibiting membership in the F.O.P. and giving his reasons therefor (63-66). From this point on the plaintiffs and adherents of the F.O.P. began a course of conduct having for its purpose the objective that the rule be abrogated. Highly inflammatory handbills and dodgers were passed out to police officers and posted on bulletin boards in police stations (Exhibits 101, 102, 104, 105, Vol I, 19 through 27). Henry Mida, State President, knew about the litigation involving the efforts of the F.O.P. to organize the police in Wyandotte and Lansing (177). Shortly after this suit was instituted he made a speech to the F.O.P. Lodge at Port Huron on February 7, 1943, in which he stated that "unless the (F.O.P.) gets a fair deal in Detroit, they could get 100,000 men and go and push the City Hall into the River" (Vol. I, 204). This speech was given wide publicity. The National organization of the F.O.P. put out an official bulletin in March 1943, and circularized Detroit's police officers with the same; portions of the exhibit (Exhibit 46, admitted in evidence as Exhibit 153) appear in Vol. II, p. 407 through 415. Heine was pictured as a martyr and given a salute for his insubordination. The same periodical contained the letter of resignation of Patrolman Fred P. Adams (Vol. I, p. 415). In this letter Adams referred to the hearing before Judge Harry Keidan as a "circus" and the procedure as a "mockery of justice."

While this case was being heard before Judge Keidan a similar case had theretofore been tried before Judge Leland W. Carr, at Lansing, Michigan, and had been appealed to the Michigan Supreme Court. The Lansing case differed from the Detroit case in that the rule in Lansing prohibited membership by Lansing police officers in the F.O.P. unless, 1st: that membership be restricted to rank

and file officers, and 2nd: that no outsiders be admitted as honorary or associate members. Judge Carr held that the rule was valid and did not violate any of the Constitutional rights of the Lansing police officers.

The decision of Judge Carr was affirmed by the Michigan Supreme Court on June 30th, 1943, and the opinion appears in 306 Mich. 68; 10 N. W. (2d) 310.

The F.O.P. represented by the same counsel appealing for petitioners in this case, then filed a petition for writ of certiorari in the United States Supreme Court alleging substantially the same claims asserted in this case, namely: that the rule was void because it deprived the petitioners of their Constitutional rights under (a) the due process clause of the fourteenth amendment to the Constitution, and (b) equal protection of the laws clause of the fourteenth amendent to the Constitution. (See Petition for Writ of Certiorari and Supporting Brief, p. 20.) Briefs in opposition to the petition for writ of certiorari were filed by attorneys for the City of Lansing and by the writer as attorney for the City of Detroit, *Amicus Curiae*. The petition was denied by the United States Supreme Court as hereinbefore related.

Subsequently Commissioner Witherspoon was succeeded by John F. Ballenger, the present Police Commissioner, who reaffirmed the order (289-290).

III.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The Police Commissioner of the Detroit Police Department promulgated an order prohibiting membersip by police officers in the Fraternal Order of Police. An order was first made in 1919 by the then Commissioner and was never rescinded. It was reaffirmed by the Commissioner in 1943, who after a thorough investigation determined that membership by police officers in the organization was inimical to the public welfare.

1. Was the rule prohibiting membership in the F.O.P. a valid exercise of authority by the Police Commissioner?
2. Is the order reasonable where it appears that the history, past conduct and leadership of the organization and its purposes are inimical to public welfare?
3. Where the rule is a condition of employment does such rule deprive police officers of any rights under the Federal Constitution?

IV.

COUNTER-STATEMENT AS TO JURISDICTION

On page 19 of petitioners' brief, pettiioners set forth the reasons relied on for the issuance of the writ of certiorari. Petitioners claim that the Supreme Court of the State of Michigan has decided a Federal question not heretofore decided by this court. We insist that the question involved in this case has been decided by the United States Supreme Court in the following cases:

United Public Workers of America v. Mitchell, 91 L. Ed. 509;

Fraternal Order of Police, et al. v. D. D. Harris, et al., Petition for Certiorari denied by the U. S. Supreme Court, 321 U. S. 784; 74 Sup. Ct. 781; 88 L. Ed. 1076;

City of Jackson v. McLeod, Certiorari denied by United States Supreme Court, 328 U. S. 863; 90 L. Ed. 1633.

We point out in our argument that this case does not present a Federal question nor does it present a Federal question not heretofore decided by this Court.

V.

ARGUMENT

The claims of the petitioners may be grouped under two heads. First: That the order was void because it was unreasonable. Second: The order was void because it was unconstitutional.

(A)

THE RULE PROHIBITING MEMBERSHIP IN THE FRATERNAL ORDER OF POLICE WAS A VALID EXERCISE OF AUTHORITY BY THE POLICE COMMISSIONER

Title IV, Chapter XXI, Section 5 (a), (c) and (m), of the Detroit City Charter reads as follows:

> "Sec. 5. The powers and duties of the Commissioner, which shall be exercised and performed as herein provided, and in accordance with the laws of the state and the ordinances of the city, shall be as follows:
>
> (a) He shall assume and exercise supervision over the Police Department and make all proper rules for the government and discipline thereof;
>
> (c) Shall preserve the public peace and prevent crime, arrest offenders and protect the rights of persons and property, guard the public health, preserve order and enforce the laws of the state and the ordinances of the city;
>
> (m) Shall have such other powers as are herein prescribed or may be necessary hereunder for the proper discharge of his duties."

Under the authority vested in him by the City Charter to exercise supervision over the Police Department and make all proper rules for the government and discipline thereof, the Commissioner promulgated a rule prohibiting

membership by police officers in the Fraternal Order of Police.

Notwithstanding the claim on page 25 of the petitioners' brief that the Commissioner did not make any investigation before instituting the action complained of, there is ample evidence to prove that the Commissioner actually made an exhaustive and painstaking investigation. In his testimony before Judges Keidan and Ferguson, Commissioner Witherspoon recited the many reasons which prompted him to prohibit memberships in the F.O.P. He declared that the order was not issued for any one specific reason but was issued for all the reasons, including the history of its activities, its manner of operation, the methods pursued in attempting to force recognition in Detroit, the provisions of the constitution and by-laws, the practice of selling honorary and associate memberships and automobile emblems, and the experiences in other cities (421).

The record is replete with evidence of conduct of plaintiffs' leaders in attempting to organize, involving *inter alia* deliberate falsification, flagrant insubordination and threats of violence. As stated by Commissioner Witherspoon: "The whole campaign has been in open defiance of the very law and order that a police officer is sworn to maintain" (55). Again, where he stated:

> "I felt that the action of Mr. Heine and Mr. Duggan in their attempt to form the Fraternal Order of Police in the Detroit Police Department was tantamount to a strike against the Department. It got down to the question of whether or not the properly constituted authorities were going to run and control the Department, or whether it was going to be controlled by others. I think that is a fair outline for the reasons and for the promulgation of my order of February 3" (408).

The constitution provided for secret work, rituals and passwords. Dues of $12.00 per year were provided for; $1.00 of which was paid to the Grand Lodge; $1.00 to the State Lodge and $2.00 for a "kitty" described as a Legislative fund. The organization had engaged in questionable methods of raising money in various cities, all of these things were taken into consideration by Commissioner Witherspoon when he promulgated his order.

There is ample justification in this record for the statement of Commissioner Witherspoon, that:

> "The Witness: * * * I banned the Fraternal Order of Police because I thought, looking at the organization in itself, in its entirety, and its activities in the other communities, their manner in attempting to organize in the Police Department—I did not look at it particularly because of this reason or that reason or the other reason. I have listed various things that I thought objectionable features of the organization which, put together, made it appear to me to be an undesirable one for the Detroit Police Department and the citizens of Detroit" (Record p. 458).

Lieutenant Kenneth R. Dickinson told about the complete breakdown in the enforcement of parking regulations in Indianapolis, because too many motorists were displaying the F.O.P. emblems and were being favored by their brother-members of the F.O.P. (Ex. Vol I, p. 252).

With this background there is no room for dispute as to the authority of the Commissioner to make the rule complained of.

In the case of *City of Jackson v. McLeod,* (1946, Miss.), 24 So. (2d) 319 (Certiorari denied U. S. Supreme Court, 328 U. S. 863, 90 L. Ed. 1633 an order was adopted "that no policeman in the city shall be a member of a labor

union," and that "any policeman who did not resign his connection with any labor union by noon of June 19, 1944, would be dismissed." A number of policemen declined to obey the order and they were discharged accordingly. They had a hearing before the civil service commission of the city and the commission sustained the discharge upon grounds of insubordination and acts tending to injure the public service. An appeal was taken to the state Circuit Court as provided by the civil service statute and judgment was rendered for petitioners. The city appealed and in reversing the judgment of the lower court it was said, commencing on page 321:

> "This case does not involve in any way the merits or demerits of labor unions when confined to private employment. In their place, outside of governmental agencies, their merits are fully conceded. It was as to their place when city policemen are involved that the civil service commission was here concerned and it is that only with which the court is concerned. And here it is to be remembered, and well noted, that a civil service commission, in its administration, is not solely a fact finding body, it is charged, as the supervising agent of the city, and within the province committed to it, with the essential discretion which must be invested in such a body in the matter of what is good policy in city employments, and in the conduct of city employees according to the character of the duties to be performed by the particular employees under consideration.
>
> It ought to be conceded by everybody that while a city policeman must perform his duties with courage and intelligence, he must do so without favoritism. Nothing could be more unbecoming to a police department than that it shall be pledged, or otherwise committed in an obligatory manner, to a preference of one group over another when all are paying their salaries, and particularly is this true when the groups are such that disputes between them are

liable to arise, which in turn may lead to disorders. And inasmuch as the City Council is elected by the people and made responsible to the people for the proper conduct of every department of the city government, the police employees must be responsible to the council and must be under its direction, free from the obligation of any other allegiance whatsoever, so far as their activities as policemen are concerned. And to fully implement this requirement, it is expressly enacted by Section 3803, Code 1942, that the City Council under the commission form of municipal government 'shall also have power * * * to make all needful rules and regulations for the government of the officers and employees of said city; to enforce a strict observance thereof, and to change the same when deemed necessary.'

"In *Fraternal Order of Police v. Lansing Board of Commissioners,* 306 Mich. 68, 10 N. W. (2d) 310, 312, the latest case on the subject, it is said: 'Police and fire departments are in a class apart. Both are at times charged with the preservation of the public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained,' quoting from *Carter v. Thompson,* 164 Va. 312, 180 S. E. 410. In *Hutchinson v. Magee,* 278 Pa. 119, 122 A. 234, that court said: 'It is generally conceded that association with any organization, which on any occasion or for any purpose, attempts to control the relations of members of either police or fire departments toward the municipality they undertake to serve, is, in the very nature of things, inconsistent with the discipline which such employment imperatively requires, and therefore must prove subversive of the public service and detrimental to the general welfare. * * * If plaintiffs desired to retain their positions in the public service, they should have obeyed the director's order; having elected not to do so (which, of course, was the privilege of each of them,

> as individuals), they cannot successfully complain on the ensuing results.' See also *McNatt et al. v. Lawther,* Tex. Civ. App., 223 S. W. 503; *San Antonio, etc., Local Union v. Bell,* Tex. Civ. App., 223 S. W. 506; *Brownell v. Russell,* 76 Vt. 326, 57 A. 103; and *McAuliffe v. City of New Bedford,* 155 Mass. 216, 29 N. E. 517. No case to the contrary of these holdings, when carefully examined, has been cited by appellee."

In the *McNatt v. Lawther* case, 223 S. W. 503 (Texas) prohibiting firemen from joining the local union, we repeat what the court said:

> "We are not called upon to express an opinion as to whether such rules were wise or not. We do conclude, however, that we cannot say that the adoption and enforcement thereof by the constituted authorities of the city was arbitrary or capricious."

We submit that the following well established legal principles are applicable to determine the validity of the rule prohibiting membership:

(a) The police head may pass a rule prohibiting membership in an organization which he believes is inimical to or conflicts with police duties;

(b) Courts will not pass upon the wisdom of the rule and substitute its judgment for that of the police head;

(c) To hold the rule invalid the court must find that there was no authority for its adoption and that the action of the police head was arbitrary and capricious.

There is no justification for the claim asserted on pages 21 through 28 of petitioners' brief, that the order prohibiting membership by police officers in the Fraternal Order of Police is unreasonable and, therefore, void.

We submit that upon this record that the order was not only reasonable but that under the facts in this case it was the duty of the Police Commissioner to promulgate such order.

(B)

NO CONSTITUTIONAL RIGHTS HAVING BEEN INVADED THERE IS NO FEDERAL QUESTION INVOLVED

Petitioners insist that the order prohibiting membership by police officers in the F.O.P. violates (a) petitioners' right of assembly as guaranteed by the Fourteenth Amendment to the Constitution of the United States; (b) deprives petitioners of property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States; (c) denies petitioners the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The answer to the charge that the rule is violative of Constitutional rights is found in the opinion of Justice Holmes in *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 29 N. E. 517, cited with approval in the case of *Public Workers of America v. Mitchell,* 91 L. Ed. 509. The petitioner had been discharged for violation of a Police Department rule prohibiting the soliciting of money for political purposes. The discharged officer claimed that the rule was invalid as invading his right to express his political opinions. In upholding the constitutionality of the rule Justice Holmes said:

> "One answer to this argument, assuming that the statute does not make the mayor the final judge of what cause is sufficient, and that we have a right to consider it (*Ham. v. Board of Police,* 142 Mass. 90, 95, 7 N. E. Rep. 540; *Osgood v. Nelson,* L. R. 5 H. L. 636, 649) is that there is nothing in the constitution or the statute to prevent the city from attaching

obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here."

In the case of *Christal v. Police Commissioner of San Francisco,* 33 Cal. App. (2d) 564, police officers had refused to testify before a Grand Jury. Police rules required them to testify. They were dismissed because of the violation of this rule. The court in sustaining their dismissal held:

"* * * Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them. (*McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 29 N. E. 517). * * *

"There is nothing startling in the conception that a public servant's right to retain his office or employment should depend upon his willingness to forego his constitutional rights and privileges to the extent that the exercise of such rights and privileges may be inconsistent with the performance of the duties of his office or employment. One of the most

cherished rights guaranteed by the Constitution is that of freedom of speech, yet no one would maintain that a police officer could fully exercise that right without violating the duties imposed upon him by the acceptance of his employment as a police officer. The right of freedom of speech might be relied upon by a police officer who had disclosed, to persons conducting an illegal establishment, information concerning the plan of the police department to conduct a raid upon such establishment, but the furnishing of such information would be inconsistent with and violative of the duties of such police officer. Such conduct would constitute cause for dismissal with or without any specific rule on the particular subject, and in the event of the adoption of a rule providing for dismissal of any officer making such disclosure, the claim that such rule violated any constitutional right of the officers would be clearly untenable. * * * The adoption of the rule and the amendment above mentioned did not impose any new duties upon the members of the department, and the adoption thereof did not operate to deprive any member of the department of the right to exercise his constitutional privilege. That privilege still existed, and was exercised by appellants. The rule is not, therefore, subject to attack upon constitutional grounds. What appellants have attempted to do is to claim an alleged right to continue as police officers despite a violation of their duties as such officers. It seems clear that they had no such right."

To sustain their proposition that the rule is violative of the rights of free speech and peaceable assembly, petitioners cite a number of cases in which this court pointed out what has now become known as the "clear and present danger" rule, and petitioners insist that in order to sustain the validity of the rule involved in this case the Police Commissioner must show that there was such a

"clear and present danger" that would warrant the adoption of this rule.

There is no justification for invoking the "clear and present danger" test in this type of case. The reasonableness of rules and regulations prohibiting policemen from belonging to organizations is not to be tested by the "clear and present danger" rule for the obvious reason that this rule has no application except to persons in general in the exercise of *their* individual constitutional rights as to free speech and assembly. The rule has no application to the government as an employer in determining what reasonably may be required of its employees in furtherance of the public service.

If, as a condition of employment, the public agency imposes a rule reasonably calculated to promote the efficiency of public service but which restricts activities of its employees which are guaranteed to all persons under the organic law, the constitutional right of the individual is not impaired as he is still free to exercise all of his constitutional rights. He is not restrained in his right to engage in the activities prohibited by the rule. The only consequence of such act is to make him subject to dismissal from the public service, a service which he voluntarily undertakes and which he may with equal freedom elect to terminate.

In the recent case of *Perez v. Board of Police Commissioners of the City of Los Angeles,* decided March 20th, 1947, 178 Pac. (2d series) 537, the court in disposing of the objection to a rule prohibiting membership in a Police Union stated:

> "A consideration of the briefs herein and of the oral argument as well, reveals that, although appellant over all argument sings the praises of the constitution on the one hand nevertheless, it presages

its destruction on the other. Notwithstanding the fact that the named defendants are individuals and make up the Police Commission of the City of Los Angeles, actually, the suit herein is against the people. It disputes the power of the people to establish and conduct the government, for it seeks to control governmental processes by indirection. For example, in the oral argument appellants stated, 'It is our contention that the nature of this organization is such that it will promote efficiency and make for better police officers.' It is common knowledge that the people have sought no assistance from the labor union referred to herein, or any other organization. And, permission by public officials to establish such an affiliation would be a direct violation of the constitution, the effect of which would, in turn, defeat the will of the people. It should be emphasized that the scheme of government basically is created by the constitution; it is the source of government. Offices and agencies are established; powers are authorized; duties are imposed on individuals and governmental agencies, all for the purpose of carrying out the will of the people. All public officials, whether national or state, executive, administrative or judicial, and all public employees, are public servants. There is but one master, the people. Hence, the common expression that, 'This is a government of laws and not of men.' The allegiance of all public servants is to the people; obviously there can be neither alienation or division of this allegiance if constitutional government is to continue. The police commission, therefore, not only had the power but it was a manifest duty to adopt and enforce the resolution herein considered. The failure to do so in effect would have amounted to a surrender of power, a dereliction of duty, and a relinquishment of supervision and control over public servants it was their sworn duty to supervise and direct.

Conditions of public employment are determined and established by the people, either directly

> through the medium of the constitution, or indirectly, by vesting power and authority in governmental agencies or offices for such purposes. For example, section 18 of Article VI of the state constitution provides that, 'The justices of the supreme court, and of the district courts of appeal * * * shall be ineligible to any other office or public employment than a judicial officer or employment during the term for which they shall have been elected or appointed.' Manifestly, the acceptance of such a position results in the surrender of certain liberties. The people however are concerned with the public good and not with the ambition or desires of the individual, and conditions of public employment are determined accordingly. In this process of state government there is no conflict with the will of the people as expressed in the federal constitution."

In the recent case of *United Public Workers of America v. Mitchell,* 91 L. Ed. 509, upholding the Hatch Act, 18 USCA Sec. 61 (h) and 61 (o), which prohibited certain political activities of Federal employees, the United States Supreme Court held that such restrictions did not infringe upon the First Amendment guaranteeing freedom of speech or the rights reserved to the People by the Ninth and Tenth Amendments and did not constitute a denial of due process guaranteed by the Fifth Amendment. After declaring that the question of the need for such regulation is for other branches of government rather than the courts, Mr. Justice Reed said at page 523:

> "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection."

In the footnote (pp. 522-3), the statement of Judge Holmes *(McAuliffe v. Mayor, supra)* heretofore referred to was cited with approval.

The Court further stated on page 524:

> "We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

In the dissenting opinion of Mr. Justice Douglas, it was pointed out that the restrictions of political activities as contained in the Hatch Act were too broad when imposed upon employees who were not in the administrative category of civil service. Mr. Justice Douglas said at page 535:

> "So, I think that if the issue tendered by Poole were tendered by an administrative employee, we would have quite a different case."

We believe that even under the tests outlined in this dissenting opinion, the prohibition would have been declared valid.

The rule in the instant case was made applicable to police officers. Courts have time and again declared that police departments are quasi military organizations and that police officers are in a class apart. Their duties, responsibilities and powers cannot be classed with those of an industrial worker of the government. Certainly with the background presented by the facts in this case, there was a "clear and present danger" to discipline and morale in the Detroit Police Department that compelled and justified the enactment of the rule complained of.

It is respectfully submitted that enforcement of the rule does not invade the constitutional rights of the petitioners.

VI.

CONCLUSION

Affiliation by police officers with an organization that exerts outside influence is incompatible with the welfare of the public. Membership in an organization that provides for National organizers, secret rituals, the sale of honorary and associate memberships, must always present a danger to discipline and morale in a Police Department. The rule limiting or restricting the right of a police officer to join an organization, the membership of which might interfere or conflict with his duties as a police officer and his loyalty to the people he serves, has long represented the policy of well regulated police departments. It is a rule that forms an integral part of the contract of employment of the officer. He knows when he joins the force he may not be able to join an organization with secrets and rituals, with national officers and organizers demand-

ing obedience to orders and with outsiders as honorary and associate members. The people of the community have a right to the enforcement of this rule. If they want the rule changed, they have the power to change it. Until that time there should be no interference by the courts or disobedience by the officers.

VII.

RELIEF SOUGHT

We respectfully ask that the petition for writ of certiorari be denied.

Respectfully submitted,

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Corporation Counsel,

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311 Police Headquarters Building,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 372

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, by its President, Henry Mida, Lodge No. 115 of the State Lodge, HOWARD HEINE and BERNARD L. DUGGAN,
Plaintiffs, Appellants and Petitioners,

vs.

CITY OF DETROIT, a Municipal Corporation, EDWARD J. JEFFRIES, Mayor of the City of Detroit, JOHN H. WITHERSPOON, Commissioner of Police of the City of Detroit, County of Wayne and State of Michigan, LOUIS L. BERG, Superintendent of Police of the City of Detroit, County of Wayne and State of Michigan,
Defendants, Appellees and Respondents

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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vs.

CITY OF DETROIT, a Municipal Corporation, EDWARD J. JEFFRIES, Mayor of the City of Detroit, JOHN H. WITHERSPOON, Commissioner of Police of the City of Detroit, County of Wayne and State of Michigan, LOUIS L. BERG, Superintendent of Police of the City of Detroit, County of Wayne and State of Michigan, Defendants, Appellees and Respondents

---

ANSWER TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF FACTS

To the Honorable Supreme Court of the United States:

Respondents, by their attorney, Nathaniel H. Goldstick, Assistant Corporation Counsel, respectfully show unto the court as follows:

Preliminary Statement

That Nathaniel H. Goldstick, Assistant Corporation Counsel of the City of Detroit, has had principal charge of this litigation and files this answer on behalf of the City of Detroit, a Municipal Corporation, and the remainder of the respondents.

That this cause was tried on issues of fact and law before the Honorable Frank Ferguson, Circuit Judge for Wayne County, Michigan. Many days devoted to the taking of proofs were had before Judge Harry B. Keidan, who conducted the hearing on the order to show cause why a temporary injunction should not issue (Exhibit Vol I, pp. 64 through 401), and before Judge Frank Ferguson, who tried the case on the merits (R. 77 through 507). Unlike most of the reported cases decided on the pleadings, sustaining the validity of similar orders prohibiting membership in organizations, this case was decided on the merits. No mention is made in the petition filed by the petitioners of the voluminous proofs adduced at the Police Trial Board hearings (Exhibits 128, 129, 130; R. 377); the hearing before Judge Keidan, covering a period of five days (Exhibit Vol I, pp. 64-401), or the trial before Judge Ferguson, that took several weeks, which conclusively showed that affiliation by Detroit police officers with the Fraternal Order of Police is hostile to public welfare and contrary to good government. In answering the petition for writ of certiorari filed herein, we, therefore, refer to proofs in the case together with the reasons given by the Police Department heads for the promulgation of the order prohibiting membership and the opinions of Judges Keidan and Ferguson, which we append to this answer for the convenience of the court.

1. Statement of Matter Involved

1. Answering paragraph one, these respondents admit that the petitioner, the State Lodge of Michigan Fraternal Order of Police is organized and chartered as a Michigan non-profit corporation, but these respondents deny that at the time of the filing of the petition Victory Lodge No. 115 Fraternal Order of Police was composed of members of the Detroit police force, and deny that any Detroit police officers are now members thereof. These respondents admit that Howard Heine and Bernard L. Duggan were police officers of the City of Detroit.

2. Answering paragraph two, these respondents admit that the City of Detroit is a municipal corporation; that Edward J. Jeffries is Mayor; that John H. Witherspoon was Commissioner of Police and Louis L. Berg was Superintendent of Police.

3. Answering paragraph three, these respondents deny that at the time the controversy involved in this cause arose that the Fraternal Order of Police had a National history of twenty-eight years, as set forth in said paragraph, but on the contrary aver that much of the history of the organization and the experience of other communities, as shown by the record in this cause, demonstrated that the organization had engaged in activities that were contrary to efficient police work. That the Michigan Supreme Court concluded from the proofs: "That the existence of plaintiff organization within the law-enforcement body of a municipality is contrary to public policy" (See *Fraternal Order of Police v. Lansing Board of Police & Fire Commissioners,* 306 Mich. 68, at p. 80; *State Lodge of Michigan v. City of Detroit, et al.,* 318 Mich. 182, at p. 188).

4. Answering paragraph four, these respondents deny that police officials are high in their praise of the organ-

ization and deny that membership in this organization builds morale and makes for better police work, but on the contrary these respondents aver that the proofs in this cause conclusively show that the organization is engaged in many practices that were and are inimical to efficient and proper police work. That among the activities and practices condemned by the Police Commissioner were:

(1) The indiscriminate sale to outsiders of honorary and associate memberships, together with automobile emblems (Exhibit Vol. II, pp. 41-42; Exhibit Vol. I, p. 252).

(2) The right of a police officer to retain his membership, even though discharged from the Police Department by reason of bribery or other causes (R. 412; Exhibit Vol. I, pp. 221-222-368).

(3) Questionable money raising campaigns through high pressure solicitations with the professional promoter getting fifty per-cent of the proceeds (Exhibit Vol. I, pp. 249-251; Exhibit 38, p. 9; Exhibit 47, p. 15; Exhibit 106, p. 29; Exhibit 107-D, p. 31; Exhibit 108, p. 33; Exhibit 109-A, p. 35; Exhibit 110-A, p. 37; Exhibit 111-A, p. 39).

(4) The activities of petitioner Heine, who on January 30th, 1945, told the Commissioner that if the organization was barred he would resign from it and who went directly from the Commissioner's office and conducted the organization and initiation meeting and had himself elected President (405-406).

(5) The activities of petitioner Duggan, who left his post without authority or permission to be elected Secretary of the new lodge and who insisted that he would be the guinea pig in a test case (R. 395; Exhibit 130, Ex. Vol. II, pp. 11-46).

(6) The assurance given by Heine to Officer Galahn that he would get the approval of his superiors, resulting in Galahn's acceptance of membership when he, Heine, knew no such assurance had been given (Exhibit 128, pp. 99-104).

(7) The circulation of highly inflammatory and slanderous handbills and printed matter among the police (See Vol. I, Exhibits pp. 19, 21, 23, 25, 27, 416).

(8) The activities of Mida, the State President, who encouraged insubordination. He knew of the litigation involving efforts to organize the police in Wyandotte and Lansing (177), and he made a speech that was given wide publicity in which he stated that "Unless the Fraternal Order of Police gets a fair deal in Detroit, they could get 100,000 men and go and push the City Hall into the river" (Exhibit Vol. I, pp. 204-206).

(9) The difficulties in traffic enforcement experienced in Indianapolis, where there was a complete breakdown of parking regulations because many of the motorists displayed Fraternal Order of Police emblems on their cars (Exhibit Vol. I, pp. 246-259).

5. Answering paragraph five, these respondents admit that the ostensible aims and purposes of the organization are as set forth in said paragraph, but these respondents deny that the organization actually operates in conformity with the purposes outlined in the National charter, but on the contrary these respondents aver that the National and State constitutions and by-laws provide for National organizers, secret work, rituals and secret passwords, provide for the sale of associate and honorary members and car emblems to outsiders, all of which is inimical to proper police work and is contrary to the best interests of the general public. That an example of the result of so-

called secret work and rituals is the refusal of Petitioner Duggan to give information to his superior about the organization because of his claim that such information was secret (Exhibit 130, Ex. Vol. II, pp. 11-46).

6. Answering paragraph six, these respondents admit that on June 5th, 1919, James Inches, then Police Commissioner of the City of Detroit, issued an order prohibiting membership by police officers in the Fraternal Order of Police, and these respondents aver that such order has never been rescinded or changed; that a copy of the said order is hereto attached and referred to as "respondents' Appendix A."

7. Answering paragraph seven, these respondents deny that the orders referred to in the said paragraph, promulgated by the Commissioners of Police, did not specifically prohibit membership in the Fraternal Order of Police, but on the contrary these respondents aver that such orders did in fact prohibit membership by police officers of the Detroit Police Department in the Fraternal Order of Police, and these respondents further aver that the order of Commissioner Inches was reaffirmed by Commissioner Witherspoon on February 23rd, 1943, and the reasons for such order stated in a report by Commissioner Witherspoon to the Common Council of the City of Detroit, copy of which report is hereto attached and marked "Respondents' Appendix B."

8. Answering paragraph eight, these respondents admit that the petitioners claim to have made inquiry relative to the holding of a banquet and admit that the Superintendent of Police made it clear to petitioner Heine that he could not organize a union or any other organization to which membership by police officers was prohibited.

9. Answering paragraph nine, these respondents admit that a dinner was held at a hotel in the City of Detroit on

Thursday, January 28th, 1943, and admit that petitioner Heine knew that permission would have to be obtained from police authorities to organize a police organization, and notwithstanding organized their organization, initiated members and elected officers, with Heine as President and Duggan as Secretary, and these respondents aver that the petitioners knew at the time of the meeting that such membership was contrary to public policy and contrary to the orders of the Police Department.

10. Answering paragraph ten, these respondents admit that a newspaper reporter was present and further aver that the reporter published an account of the meeting and among other things recited as follows:

> "In a five and one-half hour session held Thursday night behind closed doors in the Wardell Sheraton Hotel, Detroit Police Officers signified their intention of joining the National Order despite any possible executive or administrative protests" (R. 379-380).

11. Answering paragraph eleven, these respondents admit that the petitioner Heine was called into the Superintendent's office on January 30, 1943 (R. 380) and that he was interrogated by the Commissioner and Superintendent (Exhibit 139, Ex. Vol. II, p. 46-80); that these respondents aver that at the said meeting the petitioner Heine was shown the order prohibiting membership in the Fraternal Order of Police and that he advised the Commissioner of Police that he would not continue his membership in the Fraternal Order of Police but would present the matter of affiliation to the Commissioner for future determination, and these respondents aver that notwithstanding such statements to the Commissioner, Petitioner Heine did forthwith go to a meeting of the Fraternal Order of Police, which had been theretofore called,

and did engage in the organization, intitiation and election meeting of the organization (Exhibit Vol II, pp. 46-80).

12. Answering paragraph twelve, these respondents admit that the petitioner Duggan was interrogated on February 1st, 1943, (Exhibit 130, Ex. Vol. II, pp. 11-46) and that the said petitioner Duggan refused to comply with the order prohibiting membership in the Fraternal Order of Police and stated that he was willing to be a guinea pig in a test case (Vol. II, pp. 23-24).

13. Answering paragraph thirteen, these respondents admit that charges were preferred against both Heine and Duggan, and deny that they were dismissed from the Department without good cause shown, but on the contrary these respondents aver that they were found guilty of insubordination after an exhaustive hearing before the Police Trial Board, at which time they refused to avail themselves of the opportunity to take the stand and testify in their own behalf (Exhibits 128, 129 and 130; R. p. 377). In addition petitioner Duggan was found guilty of leaving his post without excuse or permission in order to join the organization.

14. Answering paragraph fourteen, these respondents admit that suit was instituted in the Circuit Court for the County of Wayne, In Chancery, and admit that the amended and supplemental bill contains the allegations set forth in the said paragraph, but these respondents deny that the allegations are true or that any such allegations were sustained by the proofs at the trial of this cause, and these respondents in their answers deny that the acts of the defendants are contrary to the rights of the plaintiffs to peaceably assemble as guaranteed by the 1st and 14th Amendments to the Constitution of the United States, and by Article 2, Section 2, of the Constitution of the State of Michigan, and deny that the

plaintiffs are denied their privileges and immunities as citizens of the United States under the 14th Amendment to the Constitution of the United States, and deny that the plaintiffs are denied equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States and the right of free speech guaranteed by the 1st and 14th Amendments to the Constitution of the United States and by Article II, Sec. 4 of the Constitution of the State of Michigan, and these respondents further aver that no constitutional rights of the petitioners were involved or invaded, in that the prohibiory order was a valid exercise of authority in setting forth one of the conditions of employment as police officers. That the petitioners were and are free to join the Fraternal Order of Police, but that they could not retain their membership and remain police officers of the City of Detroit.

15. Answering paragraph fifteen, these respondents deny that the order should be declared void and that the order discharging Heine and Duggan should be declare void and that the petitioners are entitled to injunctive relief.

16. Answering paragraph sixteen, these respondents admit that a trial was had in Wayne Circuit Court and on June 11th, 1945, a decree was entered dismissing the bill, and these respondents attached hereto a copy of the opinion of Judge Harry B. Keidan denying the application for a temporary injunction, which opinion is marked "Respondents' Appendix C," and the opinion of Judge Frank Ferguson, sitting as Trial Judge, which opinion is marked "Respondents' Appendix D."

17. Answering paragraph seventeen, these respondents admit that an appeal was taken to the Supreme Court of the State of Michigan.

18. Answering paragraph eighteen, these respondents admit that the Supreme Court of the State of Michigan rendered an opinion on May 16th, 1947. These respondents further aver that the Supreme Court under the Michigan practice tried the case *de novo* and made a finding that the prohibitory order was a valid and reasonable exercise of the power of the Police Commissioner under the Charter of the City of Detroit and that no constitutional rights were involved or invaded. For the convenience of this Court we attach a copy of the opinion, which may be found in 318 Mich. 182, and which we mark "Respondents' Appendix E."

19. Answering paragraph nineteen, these respondents admit that a motion for rehearing was filed on the following grounds:

(1) The decision of this court denies to appellants the right to peaceably assemble, which is a right guaranteed to them as a privilege and immunity of citizens of the United States under the 14th Amendment to the Constitution of the United States.

(2) The decision of this court deprives appellants of property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

(3) The decision of this court denies to appellants the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States.

20. Answering paragraph twenty, these respondents admit that a motion for rehearing was denied by the Supreme Court on June 27th, 1947.

II.

STATEMENT OF LACK OF JURISDICTION

21. Answering paragraph twenty-one of the petition, these respondents deny that the Supreme Court of the United States has jurisdiction to issue writ of certiorari, for the reason that no Federal question is involved and no rights under the Federal Constitution and the Amendments thereto are involved or invaded.

III.

QUESTIONS PRESENTED

22. Answering paragraph twenty-two, these respondents aver as follows:

That the order prohibiting membership by police officers in the Fraternal Order of Police, does not

(a) Violate petitioners' right of assembly as guaranteed by Article II, Sec. 2 of the Constitution of the State of Michigan and the 14th Amendment to the Constitution of the United States;

(b) Deprive petitioners of property without due process of law, contrary to the 14th Amendment to the Constitution of the United States;

(c) Deny to petitioners the equal protection of the laws as guaranteed by the 14th amendment to the Constitution of the United States.

IV.

REASONS RELIED ON FOR DENIAL OF THE WRIT OF CERTIORARI

23. Answering paragraph twenty-three, these respondents deny that petitioners may rely upon the reasons therein stated for the issuance of the writ of certiorari, in

that this Court has heretofore determined in the following cases that no Constitutional rights are invaded when a rule prohibiting membership in an organization regarded as contrary to public interest or like restrictions are promulgated by the governing police head or body,

United Public Workers of America v. Mitchell, 91 L. Ed. 509;

Fraternal Order of Police, et al. v. D. D. Harris, et al., Petition for Certiorari denied by the U. S. Supreme Court, 321 U. S. 784; 74 S. Ct. 781; 88 L. Ed. 1076;

City of Jackson v. McLeod, Certiorari denied by United States Supreme Court, 328 U. S. 863; 90 L. Ed. 1633.

Wherefore, these respondents pray that the application for writ of certiorari to review the decision of the Supreme Court of the State of Michigan be denied.

CITY OF DETROIT,
A Municipal corporation,
EDWARD J. JEFFRIES,
Mayor, City of Detroit,
JOHN H. WITHERSPOON,
Commissioner of Police,
LOUIS L. BERG,
Superintendent of Police of the City of Detroit, County of Wayne, Michigan,

By NATHANIEL H. GOLDSTICK,
Assistant Corporation Counsel,
Attorney for Defendants, Appellees and Respondents,
311 Police Headquarters Bldg.,
Detroit 26, Michigan.

RESPONDENTS' APPENDIX A

DETROIT POLICE DEPARTMENT

(Ex. 142, Record pp. 58-61, 4/3/45)

General Order #21-B
June 5, 1919

TO BE READ TO THE FORCE AND POSTED

TO ALL MEMBERS OF THE DEPARTMENT:

Subject: The Fraternal Order of Police, so-called.

My attention has been called to the fact that there is being formed within this Department an organization under the name of "Fraternal Order of Police," and that Patrolmen are being solicited to join without having any clear understanding of what its aims and objects are.

An investigation conducted this week renders it necessary to notify all Patrolman that this organization is not being formed in the interests of the Detroit Police Department and that the men who are joining it are being deceived as to its real character. The promoter of this organization in this city a short time ago, after having been arrested and fined in Monroe for whiskey running, and his actions after arriving here would not indicate that he had the good interests of any Policeman at heart, in fact, all of his remarks would indicate that his object is to create trouble for the Police Department and its members and to make money for himself. This man publishes a paper and, in so far as can be learned, his principal object in trying to form the organization is to get its mem-

bers to solicit advertisements for this publication, in fact, he stated at the first meeting that they could raise lots of money from the commissions which he would allow them for soliciting advertisements for his paper. Any such action or solicitation is expressly forbidden by the rules and regulations of the Department.

This Fraternal Order of Police has no existence in any other large city except Pittsburgh, where the two men who promoted it and published the newspaper have no active connection with the Police Department. The character of the organization is apparent from remarks which have been made in its first two meetings. The member selected as president, stated at a meeting held last Saturday evening that he did not care much for his job and that there were others who felt the same way, and that they might as well get as much as they could out of it while they were in it. This and other remarks of the same nature clearly indicate that the moving spirits in the formation of this organization are not working for the good of the Police Department or its members and that its continued existence could only detract from the welfare and efficiency of the Department.

In view of these facts, all Patrolmen are hereby forbidden to join this organization or to remain members of it, unless they want to be regarded as disloyal to the true interests of the Department.

In connection with this order, it may be appropriate at this time to call the attention of Patrolmen to the fact that the City of Detroit after July 1st will be paying is Patrolmen higher wages than are paid by any other large city in the world. At present the City of New York and the City of Detroit pay the highest wage, each paying $1650.00 per year, but in New York a Patrolman does not reach the first class until he has been five years in service,

while in Detroit he reaches it at the end of one year. Therefore, Detroit at present pays its Patrolmen better than any other large city, and this will be still further increased to $1700.00 after the first of July.

I would also like to call attention to the other benefits which a Policeman in Detroit receives in addition to his salary, and which make his job better than that of workmen who are receiving a dollar an hour. A Detroit Policeman has one day of leave in seven and ten days furlough in Winter and ten days furlough in Summer, with pay. He therefore works less than three hundred days per year and gets in cash almost $6.00 per day. But this is not all by any means. When a mechanic is taken sick, he not only loses his pay for every day that he is absent from work, but he is also compelled to pay for his medical attention, except in a few cases where provision is made by which a small portion is paid by the employers or from a mutual benefit insurance fund, which is taken out of the employe just the same. And any benefit of this kind that may come to a workman, even in these few cases, terminates after a given time, whereas in the Police Department if a Patrolman is taken sick he not only is cared for but his wages go on as long as he is unable to perform his work on account of sickness. Another important item to be considered is the fact that a Policeman has the privilege of retiring on a substantial pension at the end of twenty-five years of service. During the present year two men have retired from the Police Department on a pension of $65.00 per month, at the rank of Inspector, and while they were still under fifty years of age, and retired to accept other responsible positions. There are many thousands of workmen in the City of Detroit who have given hard service for much more than twenty-five years who cannot look forward to any assistance from any source when their working days are over.

It must therefore be plain to any Patrolman who looks into the matter that the benefits that he is receiving from the City of Detroit are equal to those of the highest class of mechanics, notwithstanding the fact that mechanics who receive the highest pay are men who have given years of service to reach the highest class in their work, while a Patrolman reaches his highest pay in one year. I desire to invite the attention of all Patrolmen to these facts and to remind them that no man who has the interests of the Police Department at heart will join any organization that shows its character right at the start as not having the best interests of he Police Deparment at heart.

Signed J. W. Inches
Commissioner

JWI:jgh

RESPONDENTS' APPENDIX B

(Record pp. 69-76)

February 23, 1943

The Honorable, The Common Council
City of Detroit
Detroit, Michigan

Gentlemen

A number of petitions have been filed with your Honorable Body concerning the order of this department prohibiting its members joining the Fraternal Order of Police. Some of the petitions have been referred to me. There have been so many incorrect statements of fact and some misunderstanding concerning the situation that I would

like to take this opportunity to describe the order, and the reason and necessity for its promulgation. The whole affair is so antagonistic to the basic police duty, the preservation of law and order, that I am going to review the circumstances somewhat in detail. It is exceedingly unfortunate that so much time and effort must be directed to this matter at a time when our every energy should be devoted to the war effort.

It should be understood at the outset that I am not opposed to an organization of policemen. There is no order in effect prohibiting the officers from in any manner organizing. The order in question is a specific order prohibiting the formation of an organization within the department known as the Fraternal Order of Police. Several Organizations are at the present time, and have, for some time, been in existence. We have, in addition to the Lieutenants and Sergeants Association, the Detroit Police Benefit Association, Inc., Detroit Police Relief Society and the Detroit Police Benefit and Protective Association. Since June 1st, 1942 when I accepted this position with the department and until very recently no proposal had been made to me for an organization of police officers, including the Fraternal Order of Police. Within the last few days an organization entirely within the department has been suggested by some of the officers. This suggestion has met with my approval.

In 1919, the then Commissioner of Police, Dr. James W. Inches issued an order prohibiting officers in the Detroit Police Department joining the organization known as the Fraternal Order of Police. Commissioner Inches, order stated as the reason for his decision that an investigation of the organization in 1919 disclosed that the promoter had been arrested and fined in the City of Monroe for whiskey running; that his actions after arrival

in Detroit did not indicate that he had the best interests of any policeman at heart. It was further stated by Commissioner Inches that the investigation disclosed that the principal object of the organizer at that time was a money raising scheme by the solicitation of advertisements for a publication put out by the so-called Fraternal Order. This order of Commissioner Inches has never been rescinded.

On January 28 a meeting of police officers was held at the Wardell Hotel. This meeting was represented to the Superintendent as a social gathering and had his approval. At this meeting plans were made for the formation of a so-called lodge in the Detroit Police Department, known as the Fraternal Order of Police. Immediately following this meeting, statements were taken by myself and the Superintendent from Howard Heine, then a patrolman in the department, Detective Bernard Duggan and others. Commissioner Inches' order was read to and by Mr. Heine who stated to the superintendent and myself that a Fraternal Order of Police organization had not been formed in the department, that they intended to ask permission before such an organization was formed. He also stated that no further meetings were arranged and that he, Heine, would not join such an organization if it was prohibited by departmental order. Notwithstanding such statement by Heine to his superior officers and directly contrary thereto, he shortly thereafter attended a meeting of the organization which had been previously arranged by himself and others. He further assisted in the organization of an F. O. P. order in the department and accepted the office of President.

Detective Duggan, in his statement to the Superintendent and myself admitted knowledge of the order prohibiting membership in the F. O. P., but stated that he dis-

agreed with the order and admitted that he left his regular tour of duty without permission to join the organization. Charges were preferred before the Police Trial Board against these two officers for the offenses briefly outlined above and after a full hearing they were found guilty and discharged from the department.

In the meantime full and complete consideration was given by me to the question of whether Commissioner Inches' order of 1919 should be amended, rescinded or continued in full force and effect. The result of this consideration is stated in my order, dated February 3, 1943 providing in part as follows:

> "I am not rescinding Commissioner Inches' order at this time, as I do not believe it to be in the best interests of this department and its future for the members to become affiliated with this so-called Fraternal Order. This conclusion has been reached after an investigation of the Order and a thorough and sincere consideration of all the factors involved.
>
> "The organization is not in any manner a 'Fraternal Order' in the generally accepted use of the term. It has no disability or insurance benefit fund. The Constitution provides for an office of 'National Organizer.' A portion of the dues paid are returned to the State Lodge and a part to the National Headquarters. The Grand President is empowered to compel any local lodge to comply with all edicts, laws and regulations of the Grand Lodge and its Executive Committee. One of the principal objects of the organization, as described by its State President, is to secure higher wages for Police Officers. Although the preamble of its Constitution expressly provides that it 'cannot affiliate with any Labor Organization,' the Order has more similarity to a Labor Union than a Fraternal Order.
>
> "One of its principal activities in some communities has been the raising of funds. Contributions

have been solicited of Detroit businessmen, especially those doing an interstate business, for benefit balls, picnics and the like, held by Lodges located in Ohio and Indiana. Business men in Detroit have been solicited for advertisements in the publication issued by the Order. The membership is not restricted to Police Officers, as citizens can become Associate Members. This provision, together with the practice of solicitation of funds, would make possible the extension of special courtesies which could readily conflict with the sworn duties of a Police Officer.

"The most serious condemnation that can be made of this organization is the manner in which the attempt has been made to organize it in this Police Department. The action of at least two of the organizers who have been elected to hold office in the organization in promoting it in the department has been flagrantly insubordinate and constitutes a direct and deliberate disobedience of the order of this department. This action upon the part of the two officers has resulted in charges being preferred for hearing before the Trial Board. Both of these men knew, at the time they applied and accepted membership in this organization that such was expressly prohibited by departmental order. One of the men left his regular tour of duty without permission of his superior officer to become a member.

"This conduct on the part of the two principal organizers of the Lodge in this department is, in effect, a strike against the department, a deliberate attempt to destroy the law and order that all police officers are sworn to uphold. It is unthinkable that a police department in a large metropolitan community, of necessity quasi-military in nature, could tolerate and continue to exist with such flaunting of discipline. Control of the department must and will remain in the elected and appointed officials entrusted with that responsibility.

> "It is obvious that this organization on the basis of its Constitution, history and record would be detrimental to the best interests of the Detroit Police Department and its members."

I had in my possession for the purpose of this consideration the National Constitution of the Order, the State Constitution and By-laws together with the files and records of the department pertaining to the so-called lodge and also the experience with it in some other communities. It was my considered opinion that the organization would be detrimental to the Detroit Police Department and its officers, if for no other reason than the manner in which the attempt had been made to organize it in the department. The whole campaign has been in open defiance of the very law and order that a police officer is sworn to maintain. When the State President of the organization, an officer from the Dearborn Police Department, encourages Detroit Police officers to ignore a departmental order and to join the organization, conducts an initiation into the order of an officer who deserted his post of duty to join—it is readily apparent that the maintenance of discipline in the department insofar as the F. O. P. is concerned would be impossible. The statement ascribed to the State President of the organization, in his Port Huron speech, is illustrative of the attitude of its leader. He is quoted as saying

> "If the F. O. P. is unsuccessful in establishing itself in Detroit and if certain ills in the Police Department are not corrected, we can easily get 100,000 men and they'll push the Detroit city hall into the river."

It is the sworn duty of the Detroit police officer to prevent and protect the public from the kind of conduct advocated by the State President of the F. O. P.

If the F. O. P. would not create a divided control in the department; if its leaders were sincere in their statement that there is nothing in the concepts of the organization that would be detrimental to our police force, they could in a lawful and orderly manner test the question of the validity of the order banning the organization in the department. This has been the well established procedure in a number of cities where similar controversies have arisen. Despite the fact that the validity of the departmental order prohibiting the F. O. P., as well as the action of the Police Trial Board is now pending in court, the F. O. P., its organizers and agitators at the present time are exercising every effort to encourage officers in the department to violate their oath and to ignore the departmental order. They have deliberately fostered a situation where the only issue is whether the duly appointed officials or the F. O. P. is in control of the department.

Membership in organizations by police officers is considered of such importance in the Detroit Department that the very foundation of an officer becoming a member of the force is conditioned upon it. Their oath of office, in addition to the requirement that they must swear to uphold the Constitution of the United States and the State of Michigan provides in part as follows:

> "* * * *and that I will not be or become a member of any Organization prohibited by the rules of the Detroit Police Department.* * * *"

I have said in my order that this organization has more similarity to a labor union that any other type of organization and for this reason, among others, cannot exist in the Detroit Department. It is my opinion that a police officer cannot consistently belong to a Union and perform his sworn duty. I am not an opponent of labor

unions but firmly believe that they have no place in a Metropolitan Police Department. Policemen are public officers. They have taken an oath of office that requires them to enforce the law with strict impartiality regardless of what their personal feelings may be. They should not and cannot be subject to the orders or dictation of any organization. The work of a police officer is sharply differentiated from that of a worker in private employment. He is to enforce the law upon all classes of citizens without fear or favor. If a conflict exists between his sworn duties as a policeman and his obligation to the F. O. P., the situation immediately arises that always occurs when a man attempts to serve two masters—he either fails in his duty as a police officer or in his obligation to the organization. It is readily apparent from the activities of the F. O. P. to date that his first obligation in their concept, is to that organization.

A police department is a quasi-military organization—the preservation of discipline is an essential factor of primary importance. The present activity of this fraternal order, so-called, is an obvious effort to destroy that basic requirement. The demoralizing impact upon the department apparently intended by this so-called lodge will not be effective—control will be retained by those vested with that responsibility. I am convinced that the rank and file are not in sympathy with the movement to undermine the department. The large majority of police officers are complying in full with their oath of office and are upholding their sworn duty as police officers. They will continue to do so.

The officers violating their oath, and joining the organization banned by official order will have charges preferred against them and will be brought before the Police Trial Board. Every effort and all means necessary will

be used to enforce the order which is in my opinion, manifestly necessary.

I will be glad to furnish at any time any additional information that your Honorable Body may desire concerning this matter.

Respectfully submitted,

John H. Witherspoon,
Commissioner.

JHW-s
d.

RESPONDENTS' APPENDIX C

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne.

Before the Honorable Harry B. Keidan, Circuit Judge

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, et al., Plaintiff, v. CITY OF DETROIT, a Municipal Corporation, et al., Respondent.	No. 338,440.

THE OPINION OF THE COURT

The Court: Well, gentlemen, I regret very much that this situation has arisen. It would have been better for everybody concerned if those who are promoting the Fraternal Order of Police in Detroit had gone to the proper officials and communicated their desires to them, and if they received from such officials a negative reaction, to then present the matter to the Court for judicial determination before proceeding with the organization and thus jeopardize the position of many men in the Police Depart-

ment. That wasn't done however, and that's water over the dam.

This case, as I see it, presents purely a legal question, namely, where the Police Commissioner of the City of Detroit, both the person now holding that position and his predecessors, had a legal right to pass a rule or regulation prohibiting membership in a particular organization.

I am not the Police Commissioner of the City of Detroit and, under the law, I have no right to substitute my judgment for his. Courts have held time and again that even legislation that attempts to delegate to a court the power of administration is unconstitutional.

However, courts do have the legal right to review the action of administrative bodies, in order to determine whether they acted within the authority of law, and that's as far as this Court can go.

Now, no one claims, and no one can claim that a Police Commissioner can prohibit a policeman from joining any or all organizations. That, of course, would be contrary to the constitution of this country and the constitution of this state, but the courts have generally held that they do have a right to prohibit their attachment to an organization, the objects of which might interfere with the proper performance of the duties of police officers.

Now, there is no question but what under the Charter, the Police Commissioner of this City has the legal right to pass such rules and regulations as, in his judgment, he deems to be in the best interests and for the welfare of the people of the municipality.

The question arises, therefore: Is the enactment of the particular rule that has been questioned in this case reasonable, or was the action of the Commissioner and his

predecessor arbitrary and capricious? and I think that defines the power of this Court.

I have given careful attention to the testimony that has been taken here, both on the Petition for an Order to show Cause why an Injunction should not be issued, and also on the motion to dismiss, and I cannot help but reach the conclusion that the action of the Commissioner was not arbitrary and capricious. He has stated on the record of this Court the reasons for re-enacting or continuing the rule established by Commissioner Inches years ago. There have been produced on the hearing of these motions certain documentary evidences as to the activity of other lodges of this organization in other communities, which the Commissioner testifies, in his judgment, he cannot approve of, if carried out through the local lodge of the Fraternal Order of Police, and it is significant, too, that both the President of the State Fraternal Order of Police and the President of the Local, when confronted with certain alleged actions on the part of other locals, themselves have disapproved of such conduct.

I cannot say as a matter of law that the action of the Commissioner, in enforcing this rule, is either arbitrary of capricious, and, as I said before, I can not substitute my judgment for that of the Police Commissioner. If the Police Commissioner's actions do not meet with the approval of the men, that is a matter which can be corrected by appealing to the appointive power of the City of Detroit, but for any Court to undertake to say that the Commissioner should not have passed, or re-enacted, a rule similar to the one in question would be going beyond any power that the Court has ever tried to exercise, so far as I know. So that it becomes the duty of the Court to deny the petition for injunctive relief.

That leaves the question as to the Motion to Dismiss, filed on behalf of the defendants. I believe, as I indicated before, that a judicial determination of this issue should be had without delay, and as soon as possible. If counsel will agree that I may interpret the rule in question as being set up in the Bill of Complaint, why I am prepared to dispose of that motion now. I don't know as there is any copy of the rule set up in the Bill of Complaint. On a Motion to Dismiss the Bill of Complaint, everything must be before the Court, and as to the allegations that are well pleaded in the bill, it must be assumed to be true. Now, if you gentlemen will agree that the rule referred to in the evidence is in the Bill of Complaint, I will dispose of that now so that you can get a review of this matter as soon as possible.

Mr. Goldstick: Well, if the Court please, in view of the Court's declaration to the effect that the Court desires to dispose of this matter on the merits, so to speak—that is to say, that we are all entitled to a determination of the legality of the rule, or the right of the Court to interfere with the Police Commissioner, and in view of the fact that testimony has been taken, probably all of the testimony that would be taken in a trial of the cause on the merits, I would be willing to stipulate with counsel that the Court's opinion shall be embodied in a final decree so that if counsel cares for a further adjudication in the Supreme Court, we can speedily go there and that will eliminate all of the intermediate motions and counter motions. Now, it seems to me that we ought to be able to agree that the Court's decision will be embodied in a final decision that can be appealable, without leave of the Court, to the Supreme Court.

The Court: Well, I believe, gentlemen, that you should get a final decision from the higher court as soon as pos-

sible. I think it is to the interest of the police and to the interest of the public. From the information that I have received during the hearing of this matter, matters within the department are in a sad state, and each day just makes it that much worse. I think the sooner this matter is decided finally, the better for everyone, and I hope that there won't be any delays on the part of either side.

Mr. Goldstick: Well, I am prepared to proceed.

The Court: Now, after all, we have got to remember that the Police Department, as has been said in each of the cases that I have looked at, is a quasi-military organization. This country is at war, and only the Lord knows what may happen. I think to have a Police Department split as this department is being split now, according to the information I have, is very detrimental to the public interests, and I think the sooner we have this matter finally decided, the better off everyone concerned will be, especially the people of this city. So if you want to do that, it will be a good thing.

RESPONDENTS' APPENDIX D

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne, In Chancery

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, a Michigan non-profit corporation, VICTORY LODGE No. 115, FRATERNAL ORDER OF POLICE, an unincorporated voluntary association; HOWARD HEINE, BERNARD L. DUGGAN and HENRY MIDA, Plaintiffs, v. THE CITY OF DETROIT, a Municipal Corporation; EDWARD J. JEFFRIES, Mayor of the City of Detroit, et al., Defendants.	No. 338,440.

OPINION OF THE COURT

Howard H. Heine and Bernard L. Duggan were police officers holding the rank of detectives in the Police Department of the City of Detroit. January 28, 1943, they attended a dinner party at which Henry Mida, president of the State Lodge of Michigan, Fraternal Order of Police, discussed the organization of a local chapter of the Fraternal Order of Police, in the Police Department of the City of Detroit. At this meeting it was decided to organize a local lodge and a meeting was called for January 30, 1943, for that purpose. Detectives Heine and Duggan were active in arranging this meeting and in organizing the Victory City Lodge 115, Fraternal Order of Police. Heine was elected president and Duggan was elected secretary. They were also appointed on a committee to draw up the constitution and by-laws of said lodge.

January 30, 1943, prior to the meeting at which said lodge was organized, Heine and Duggan were called before John H. Witherspoon, Commissioner of Police, and Louis L. Berg, Superintendent of Police, and questioned about their activities in this organization. They were informed of an order issued June 5, 1919, by Police Commissioner, Dr. James W. Inches, prohibiting members of the Police Department joining the Fraternal Order of Police, which order reads as follows:

"DETROIT POLICE DEPARTMENT

General Order #21-B
June 5, 1919

TO BE READ TO THE FORCE
AND POSTED

To All Members of the Department:

Subject: The Fraternal Order of Police, so-called.

My attention has been called to the fact that there is being formed within this Department an organization under the name of 'Fraternal Order of Police,' and that Patrolmen are being solicited to join without having any clear understanding of what its aims and objects are.

An investigation conducted this week renders it necessary to notify all Patrolmen that this organization is not being formed in the interests of the Detroit Police Department and that the men who are joining it are being deceived as to its real character. The promoter of this organization arrived in this city a short time ago, after having been arrested and fined in Monroe for whiskey running, and his actions after arriving here would not indicate that

he had the good interests of any Policeman at heart, in fact, all of his remarks would indicate that his object is to create trouble for the Police Department and its members and to make money for himself. This man publishes a paper and, in so far as can be learned, his principal object in trying to form the organization is to get its members to solicit advertisements for this publication, in fact, he stated at the first meeting that they could raise lots of money from the commissions which he would allow them for soliciting advertisements for his paper. Any such action or solicitation is expressly forbidden by the rules and regulations of the Department.

This Fraternal Order of Police has no existence in any other large city except Pittsburgh, where the two men who promoted it and published the newspaper have no active connection with the Police Department. The character of the organization is apparent from remarks which have been made in its first two meetings. The member selected as president, stated at a meeting held last Saturday evening that he did not care much for his job and that there were others who felt the same way, and they might as well get as much as they could out of it while they were in it. This and other remarks of the same nature clearly indicate that the moving spirits in the formation of this organization are not working for the good of the Police Department or its members and that its continued existence could only detract from the welfare and efficiency of the Department.

In view of these facts, all Patrolmen are hereby forbidden to join this organization or to remain members of it, unless they want to be regarded as disloyal to the true interests of the Department.

* * *"

They were also charged with notice of an order issued May 26, 1936, by Commissioner Heinrich A. Pickert, which reads as follows:

"DETROIT POLICE DEPARTMENT

Office of the Commissioner

General Order #347

May 26, 1936

To All Members of the Department:

Subject: Organizations in Conflict with Police Duty.

Your attention is called to Section 124 of the General Rules in the Detroit Police Manual, which reads as follows:

'Prior Claim on Police Duty. A member of the Department is prohibited from affiliating with any organization or body, the provisions of the constitution of which would in any way exact prior consideration and prevent him from performing police duty.'

The oath you took at the time of your appointment reads as follows:

'I, (repeat own name), do solemnly swear that I will support the constitution of the United States, the constitution of the State of Michigan, obey the rules and regulations of the Detroit Police Department, and faithfully perform the duties of a policeman, and that I will not be or become a member of any organization whatever which is affiliated with any organization which holds or claims or exercise the right to demand obedience of me or to direct me to disobey a rule of the Detroit Police Department, so help me God.'

Any member belonging to organizations in conflict with the above shall immediately sever all connections."

At this meeting with Commissioner Witherspoon and Superintendent Berg, Heine and Duggan were told that they could not join the Fraternal Order of Police. Disregarding these orders, they went to the meeting the same evening and continued activities in the organization of the lodge. The next day a conference was had with detective Duggan at which he insisted upon his right to join said lodge, and refused to sever his connection with the same, whereupon, on the following day, February 2, 1943, charges were preferred against Heine and Duggan as follows:

"DETROIT POLICE DEPARTMENT

Office of the Superintendent

Date: February 2, 1943

Division or Precinct
No. Recorder's
Court

To: Patrolman Howard Heine

You are hereby notified to appear before the Police Trial Board at 9:00 A. M. on Friday, February 5, 1943 to answer charges which have been preferred against you.

Peter J. Bauer, Lieutenant
Commanding Recorder's Court
Division.

"1. *Disobedience of Rules and Order of the Police Department:*

(a) That he did assist in the organization of and did join the Fraternal Order of Police in violation of General Order #21-B dated June 5, 1919, prohibiting police officers from joining the Fraternal Order of Police or remaining members of the same.

(b) That he did assist in the organization of and did join the Fraternal Order of Police in violation of Section 124 of the Detroit Police Manual reading as follows: 'A member of the Department is prohibited from affiliating with any organization or body, the provisions of the constitution of which would in any way exact prior consideration and prevent him from performing police duty.'

(c) That he did assist in the organization of and did join the Fraternal Order of Police notwithstanding the fact that he had theretofore been advised and knew that no permission had been given for membership in the Fraternal Order of Police.

2. *Report Falsely to a Superior Officer:*

That on Saturday, January 30th, 1943, he did report to the Commissioner and Superintendent of Police that no arrangements had been made for a further meeting of the group organized as the Fraternal Order of Police, when in truth and in fact the said Heine did assist in arrangements for the holding of a meeting of the group known or to be known as the Fraternal Order of Police, for the afternoon of Saturday, January 30th, 1943, and that when Heine advised the Commissioner and Superintendent of Police that no further meeting had been planned, he well knew that such a meeting had been planned for the afternoon of Saturday, January 30th, 1943.

3. *Insubordination to a Superior Officer:*

That on Saturday, January 30th, 1943, said Heine did advise the Commissioner and Superintendent of Polire that he, Heine, would not violate an order of the Department of Police in order to join the Fraternal Order of Police and that

if the Order prohibiting such organization affiliation was not rescinded he, Heine, would withdraw from such organization; that notwithstanding such statements to the Commissioner and Superintendent of Police, he, the said Heine, did immediately thereafter go to the meeting of the Fraternal Order of Police, that he did conduct such meeting as President of the organization, did join and remain a member of such organization, and did assist in the induction of other members of the Detroit Police Department in the organization."

"DETROIT POLICE DEPARTMENT
Office of the Superintendent,

Date: February 2, 1943

No. Juv. Div. Division or
To Detective Bernard L. Duggan Precinct

You are hereby notified to appear before the Police Trial Board at 9:00 A. M. on Friday, February 5, 1943 to answer to charges which have been preferred against you.

William M. Johnson,
Detective Inspector
Commanding Juvenile Division

1. *Absent from Duty Without Leave or Permission:*

   (a) That he did absent himself from duty without leave or permission and without reporting his whereabouts on Saturday, January 30th, 1943 from 3 to 4 P. M.

2. *Disobedience of Rules and Orders of the Police Department:*

   (a) That he assisted in the organization of and joined the Fraternal Order of Police, in vio-

lation of General Order #21-B dated June 5, 1919, prohibiting police officers from joining the Fraternal Order of Police or to remain members of the same.

(b) That he assisted in the organization of and joined an organization known as the Fraternal Order of Police in violation of Section 124 of the Detroit Police Manual, reading as follows: 'A member of the Department is prohibited from affiliating with any organization or body, the provisions of the constitution of which would in any way exact prior consideration and prevent him from performing police duty.'

(c) That he did on Saturday, January 30th, 1943, assist in the organization of and did join an organization known as the Fraternal Order of Police, well knowing that such action was contrary to the express orders and rules of the Detroit Police Department.

3. *Insubordination:*

That on Monday, February 1st, 1943, that he declared to the Commissioner and Superintendent of Police that he did join the Fraternal Order of Police, notwithstanding the departmental rule, because he, Duggan, believes the rule to be wrong.''

February 3, 1943, Commissioner Witherspoon made the following order:

"DETROIT POLICE DEPARTMENT

Office of the Commissioner

General Order #561

February 3, 1943.

To All Members of the Department:

Subject: Membership in the Fraternal Order of Police, so-called.

Two meetings have recently been held by members of the department. At the meeting held Thursday, January 28, 1943, temporary officers were elected; subsequently and on January 30, 1943, several members of this department made application for membership, paid dues and became members of an organization known as the Fraternal Order of Police.

In General Order No. 21-B, dated June 5, 1919, and signed by the then Commissioner of Police, James W. Inches, membership in the Fraternal Order of Police by patrolmen in this department was prohibited. This provided in part, as follows:

> 'In view of these facts all Patrolmen are hereby forbidden to join this organization or to remain members of it, unless they want to be regarded as disloyal to the true interests of the department.'

This order has never been rescinded and is in full force and effect at this time. The order of 1919 uses the word 'patrolmen,' apparently to distinguish police officers from civilian members of the department. It seems clear, from a reading of the entire order, that it applies to all officers. However, in order that there shall be no misunderstanding, the

order of this department pertaining to this organization covers police officers of every rank and duty. This order of Commissioner Inches, as is expressly stated therein, was based upon an investigation of the organization at that time which disclosed that the promoter had been arrested and fined in the City of Monroe for whiskey running; that his actions after arriving in Detroit did not indicate that he had the best interest of any policeman at heart. It was further stated by Commissioner Inches that the investigation disclosed that the principal object of the organizer at that time was a money raising scheme by soliciting advertisements for a publication put out by the so-called Fraternal Order.

I am not rescinding Commissioner Inches' order at this time, as I do not believe it to be in the best interests of this department and its future for the members to become affiliated with this so-called Fraternal Order. This conclusion has been reached after an investigation of the Order and a thorough and sincere consideration of all the factors involved.

The organization is not in any manner a 'Fraternal Order' in the generally accepted use of the term. It has no disability or insurance benefit fund. The constitution provides for an office of 'National Organizer.' A portion of the dues paid are returned to the State Lodge and a part to the National Headquarters. The Grand President is empowered to compel any local lodge to comply with all edicts, laws and regulations of the Grand Lodge and its Executive Committee. One of the principal objects of the organization, as described by its State President, is to secure higher wages for Police Officers. Although the preamble of its Constitution expressly provides that it 'cannot affiliate with any Labor Organization,' the Order has more similarity to a Labor Union than a Fraternal Order.

One of its principal activities in some communities has been the raising of funds. Contributions

have been solicited of Detroit businessmen, especially those doing an interstate business, for benefit balls, picnics and the like, held by lodges located in Ohio and Indiana. Businessmen in Detroit have been solicited for advertisements in the publication issued by the Order. The membership is not restricted to Police Officers, as citizens can become Associate members. This provision, together with the practice of solicitation of funds, would make possible the extension of special courtesies which could readily conflict with the sworn duties of a police officer.

The most serious condemnation that can be made of this organization is the manner in which the attempt has been made to organize it in this Police Department. The action of at least two of the organizers who have been elected to hold office in the organization in promoting it in the department has been flagrantly insubordination and constitutes a direct and deliberate disobedience of the order of this department. This action upon the part of the two officers has resulted in charges being preferred for hearing before the Trial Board. Both of these men knew, at the time they applied and accepted membership in this organization that such was expressly prohibited by departmental order. One of the men left his regular tour of duty without permission of his superior officer to become a member.

This conduct on the part of the two principal organizers of the Lodge in this department is, in effect, a strike against the department a deliberate attempt to destroy the law and order that all police officers are sworn to uphold. It is unthinkable that a police department in a large metropolitan community, of necessity quasi-military in nature, could tolerate and continue to exist with such flaunting of discipline. Control of the department must and will remain in the elected and appointed officials intrusted with that responsibility.

It is obvious that this organization on the basis of its Constitution, history and record would be detrimental to the best interests of the Detroit Police Department and its members.

Several of the men who have joined this organization have stated that they were unaware of the existence of the order in 1919. Police officers of every rank and duty in this department are hereby advised that the order of 1919 is in full force and effect. Such officers are hereby forbidden to join this organization or to remain members of it. To do so will be directly contrary to the oath that all of you took when you became members of the Detroit Police Department.

John H. Witherspoon,
Commissioner."

February 3, 1943, Heine and Duggan, the State Lodge of Michigan, Fraternal Order of Police, and the local lodge, Victory City Lodge 115, filed a bill of complaint seeking an injunction to restrain the defendants from interfering with the organization of the local lodge, prohibiting police officers from joining the same, and holding trials on the charges preferred against Duggan and Heine.

A restraining order was not issued and the Trial Board proceeded with its trials. On February 5th and 6th, 1943, Heine and Duggan were found guilty and dismissed from the Police Department. An order to show cause why the injunction should not issue as prayed for in the bill of complaint, was issued on February 9, 1943, which came on for hearing before the Honorable Harry B. Keidan, and which was denied March 4, 1943.

June 25, 1943, an amended and supplementary bill of complaint was filed in pursuance of an order of the Court, wherein plaintiffs asked for an injunction reinstating Duggan and Heine as police officers and restraining the

defendants from interfering with the organization of Victory City Lodge 115, Fraternal Order of Police, and from prohibiting police officers from joining the same. The defendants filed an answer July 14, 1943. The trial began February 27, 1945, and was concluded April 4, 1945.

The plaintiffs claim:

First: The Commissioner of police was without power to issue an order prohibiting a police officer from becoming a member of the Fraternal Order of Police;

Second: That the order prohibiting membership in the Fraternal Order of Police is unconstitutional because it denies the right of free speech, the right of assembly and the equal protection of the law as guaranteed to them under Section 1 of the Fourteenth Amendment of the Constitution of the United States, the First Amendment of the Constitution of the United States, Article 2, Section 2 of the Constitution of the State of Michigan, Article 2, Section 4 of the Constitution of the State of Michigan;

Third: That the Commissioner's action was arbitrary and unreasonable because under the constitution and by-laws of Victory City Lodge 115, Fraternal Order of Police, there is nothing inimical to the performance of police duties but, on the contrary, its organization and existence and membership therein by police officers will be helpful and beneficial to police work;

Fourth: That the discharge of Heine and Duggan was unreasonable and unauthorized and they should be reinstated.

I shall deal with the plaintiffs' contentions in the order named.

First: The Police Commissioner of the City of Detroit is appointed by the Mayor of the City of Detroit. The authority for his appointment is found in Title IV, Chapter XXI, Section 1 of the Charter of the City of Detroit, which reads:

> "There shall be a Commissioner of Police who shall be appointed by the Mayor and who shall have charge of the Police Department."

The Commissioner has such powers and duties as are conferred upon him under Title IV, Chapter XXI, Section 5 (a), (c) and (m) of the Charter of the City of Detroit, which reads:

> "Sec. 5. The powers and duties of the Commissioner, which shall be exercised and performed as herein provided, and in accordance with the laws of the state and the ordinances of the city, shall be as follows:
>
> (a) He shall assume and exercise supervision over the police department and make all proper rules for the government and discipline thereof;
>
> (c) Shall preserve the public peace and prevent crime, arrest offenders and protect the rights of persons and property, guard the public health, preserve order and enforce the laws of the state and the ordinances of the city;
>
> (m) Shall have such other powers as are herein prescribed or may be necessary hereunder for the proper discharge of his duties."

By virtue of the authority granted in the above Charter provisions, the Commissioner has the authority to make all proper rules for the government and discipline of the Police Department. However, the courts have held that orders made for this purpose must be reasonable and the reasonableness of the exercise of police power is sub-

ject to judicial review. The determination as to the reasonableness must be made in the light of the facts presented in each case. I therefore decide that the Commissioner has the authority to make reasonable orders for the government and discipline of the Police Department. I will pass on the reasonableness of said order later when I consider Plaintiffs' third contention.

Second: Plaintiffs contend that the Commissioner's order prohibiting membership in the Fraternal Order of Police is unconstitutional because it is in conflict with the First Amendment to the Constitution of the United States, Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 2, Article 2 of the Constitution of the State of Michigan. Defendants claim the order does not conflict with these provisions of the Federal and State Constitutions and is, therefore, constitutional and it was held in the case of *Fraternal Order of Police v. Lansing Board of Police and Fire Commissioners,* 306 Mich, page 68.

Plaintiffs contend that the constitutional questions were not raised in that case, were not passed upon by the trial Judge nor the Supreme Court, and that for this reason plaintiffs were deprived of a review in the Supreme Court of the United States. I have examined plaintiffs' bill of complaint in the Lansing case and find that in paragraph 10 it was claimed that the order prohibited the right of people to peaceably assemble, contrary to the provisions of the First Amendment to the Constitution of the United States, and that it denied police officers equal protection of the law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the right of assembly, contrary to Section 2, Article 2 of the Constitution of the State of Michigan.

I have read Judge Carr's opinion in that case and find that he treated the constitutional questions raised at some length and decided that the First Amendment to the Constituion was a resriction of the power of the Federal Government and does not directly concern action by state or municipal authority. I also find that he decided that certain provisions of the Bill of Rights of the State Constitution were involved and there was no specific showing of any violation of such provisions, but did find that under the Fourteenth Amendment to the Federal Constitution, as well as under certain provisions of the Constitution of the State of Michigan, the reasonableness of the action of the Board was a matter for consideration.

I have examined the opinion by the Supreme Court and find that the constitutional question was considered and disposed of in the following manner: "Neither the plaintiffs nor the individuals concerned are deprived of any constitutional right." I therefore am of the opinion that plaintiffs' contention that constitutional questions were not properly raised and disposed of in the trial court and in the Supreme Court in the Lansing case, is without merit. I therefore find that the order does not conflict with the provisions of the Constitutions mentioned.

However, under the Constitutions of the United States and of the State of Michigan the question of reasonableness of an order of a police commissioner is a proper judicial inquiry. I will now consider the reasonableness of this order in the light of constitutional amendments.

This is an order involving discipline in the Detroit Police Department. This does not interfere with an individual's right to exercise free speech and free assembly. The Fraternal Order of Police did not attempt to organize a lodge of private citizens. What it attempted to do was organize a lodge of police officers. This order of the

Commissioner does not affect the plaintiffs' rights as private citizens in joining a lodge, but it does affect the rights of a police officer.

The Courts have said:

> "Those who serve the public either as makers of the law, or interpreters of the law, or those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights."

If the plaintiffs, Duggan and Heine, desired to retain their positions in the public service, they should have obeyed the Commissioner's order. Having elected not to do so, which, of course, was the privilege of each one of them as individuals, they cannot successfully complain of the ensuing results.

Many cases have been considered in other jurisdictions involving the question under consideration in this case. In *Brownell v. Russell,* 76 Vt. 326, an order forbade members of the police department from taking part in any political caucus. The Court said:

> "We think that the removal of the police force from the field of active politics is calculated to promote the efficiency of the force and the purity of municipal government, and that the rule adopted imposes no greater restriction than is reasonably necessary to the accomplishment of this purpose."

In *Carter v. Thompson,* 164 Va. 312, the Court in considering an order prohibiting firemen from joining a local lodge affiliated with the International Association of Fire Fighters, said:

> "Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to

> the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained."

The order was found reasonable.

In *Hutchinson v. Magee,* 278 Pa. 119, the Court said:

> "It is generally conceded that association with an organization which, on any occasion or for any purpose, attempted to control the relations of members of either the police or fire departments toward the municipality they undertake to serve, is, in the very nature of things, inconsistent with the discipline which such employment imperatively requires, and therefore must prove subversive of the public service and detrimental to the general welfare. * * *"

In *Neustein v. Mitchell,* 52 Fed. Supp. 531, the Court considered the Hatch case prohibiting political activity on the part of employees. Under this act no officer or employee with any state or local agency financed by Federal loans or grants should take any active part in political management or in political campaigns under penalty of the withholding of Federal loans or grants equal to two years' compensation of the offending employee. This order was held reasonable and not a violation of plaintiff's constitutional rights.

There are cases which uphold the right of boards of education to prohibit teachers from joining labor unions.

> *Seattle High School Cap. No. 200 v. Sharpers,* 293 Pac. 994 (Wash);
> *Frederick v. Owens,* 35 Ohio Ct. Ct. Reports, 538.

The courts have upheld legislation abolishing fraternities in state universities and prohibiting the joining of fraternities by high school school students.

University of Mississippi v. Law, 233 U. S. 589; *Steele v. Sexton,* 253 Mich. 32.

"There is no doubt the control of a city police department is a function of municipal government. *Smith v. Flint City Commission,* 258 Mich. 698."

In *Doyle v. Kammeraad,* 310 Mich. 241, and *Fraternal Order of Police v. Lansing Board of Police and Fire Commission,* 306 Mich. 68, the Court said:

"The individual defendants herein were responsible to the people for law enforcement and preservation of the public peace. Members of a police force, as well as its responsible officers, in many respects constitute a military force, something more than an ordinary executive branch of government. Discipline must be enforced, and the members must surrender individual powers and freedom of action in favor of undivided allegiance to their police duty."

Plaintiffs contend that there is nothing inimical to the performance of police duties under the constitution and by-laws of Victory City Lodge 115, Fraternal Order of Police, but, on the contrary, its organization and existence and membership therein by police officers will be helpful and beneficial to police work.

The plaintiffs have called a number of witnesses from various parts of the United States, including patrolmen, detectives, sheriffs and chiefs of police, who belong to the Fraternal Order of Police in their respective communities, who have testified that membership in the Fraternal Order of Police did not in any way conflict with the duties of a police officer, but, on the contrary, brought about association of police officers from various communities which was helpful and beneficial to police work.

On the other hand, the defendants produced testimony to show that many of the lodges throughout the country made a practice of issuing associate membership cards to citizens and charged dues in sums ranging from five to ten dollars apiece; that a metal emblem with the insignia of the Fraternal Order of Police impressed thereon was issued to associate members to be displayed above the license plate of the car, and contended that there was a possibility that, even though this was not to be the practice in Victory City Lodge 115 in the City of Detroit, if associate members visited Detroit, certain courtesies and special privileges might be extended to brother members of a lodge from another community in event they violated parking ordinances or other laws.

I agree with Justice Bushnell, who in the Lansing case said:

> "One would be naive, indeed, to assume that such automobile emblem did not carry with it the intimation of special privilege to associate members. This of itself is enough to require the determination that the existence of plaintiff organization within the law-enforcement body of a municipality is contrary to public policy."

It is, therefore, reasonable to assume that if associate members of the Fraternal Order of Police in other communities visited Detroit, displaying an emblem, they would expect special privileges and they would receive the same.

It is defendants' contention that local lodges of the Fraternal Order of Police in other communities have raised money by staging dances and carnivals, and that they have solicited citizens of their community for donations and subscriptions for advertising in programs publicizing said events, and that this method of raising funds likewise carries with it an intimation of special privileges to those who contrbute.

Plaintiffs contended that the Commissioner and superior officers of the Police Department of the City of Detroit countenanced this method of raising funds for the Police Benevolent Association when they solicited contributions from citizens and subscriptions for advertisements in the Police Field Day magazine; that if they took no steps to prohibit this activity, they were not in a position to complain if the same methods were used to raise funds by the Fraternal Order of Police.

Perhaps, if contributions were sought and subscriptions for advertising were taken from citizens whom the Police Department did not contact daily in the enforcement of the law, it might not be objectionable, although there is some doubt in my mind as to that. But if the donations and the solicitation for advertisements are taken from those citizens and business places whom the Police Department call on daily to observe whether or not they are violating the law, then these donations might convey to the donors that they will receive privileges and leniency from the police officers, and this would be equally objectionable and contrary to public policy.

At this point we must note a further contention of the plaintiffs that, Victory City Lodge does not intend to do these things which are objectionable. But if this lodge is formed, the Police Department has no control over the actions of the Fraternal Order of Police in the future. The order prohibiting membership in the Fraternal Order of Police is not an order against the Fraternal Order of Police. It does not in any way interfere with the Fraternal Order of Police forming a lodge in the City of Detroit. It does not interfere with lodge business, or could it interfere with the lodge activities because the lodge is not under the supervision or control of the Police Department.

Courts are not called upon to determine whether or not the order of a police commissioner was a wise one. The Court has no right to substitute its judgment for the commissioner's. Even legislation giving the courts the power of administration has been held unconstitutional. The sole question to be determined is: is the rule reasonable or is it arbitrary and capricious? I cannot say that this rule is either arbitrary or capricious, and I cannot substitute my judgment for that of the Police Commissioner.

For the reasons heretofore stated, I hold that the Commissioner had the power to make the order and that it is a reasonable order.

Fourth: Was the dismissal of Heine and Duggan unauthorized and unreasonable, and should they be reinstated?

I have heretofore held that the order of the Commissioner was reasonable and that he had the authority to make the order. I have also held that the Court has no right or jurisdiction to substitute its judgment for the Commissioner's. The right to maintain discipline in the Police Department includes the right to punish a police officer for violation of the rules of the Department. It is not for the Court to say whether or not the punishment of Heine or Duggan was too severe. Its only jurisdiction is to determine whether or not there is sufficient competent evidence to sustain the findings of the Trial Board.

General rules of evidence and procedure as apply in a trial at law, do not govern the hearings of the Trial Board to determine charges against a police officer. In *Aller v. Detroit Police Department Trial Board,* 309 Mich. 382, the Court said:

> "Law and order can only be maintained in the hands of police officers who are, in the opinion of

> their superiors, fit and proper persons to administer and enforce the law. Such responsibility should not be curtailed or circumscribed by insistence upon the application in each instance of technical rules as to admissibility of proof, even though the finding of fact by the board must be 'supported by evidence.' On the other hand, the police trial boards should be free to work out their own rules of procedure and pursue such methods of inquiry that will permit them to adequately discharge their responsibilities to the public. The rules of fair play in such instances are of far more importance to the public and the police officers concerned than is the application of strict legal procedure.''

I have examined the evidence that was placed before the Trial Board and find that there was sufficient competent evidence to sustain the Trial Board's findings.

For reasons herein stated, a decree may be entered dismissing plaintiffs' bill of complaint.

Signed—Frank B. Ferguson,
Circuit Judge.

Dated: May 9, 1945.

RESPONDENTS' APPENDIX E

STATE OF MICHIGAN—SUPREME COURT

Filed May 16, 1947

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, a Michigan Non-profit corporation, VICTORY LODGE No. 115, FRATERNAL ORDER OF POLICE, an unincorporated voluntary association; HOWARD HEINE, BERNARD L. DUGGAN and HENRY MIDA,

Plaintiffs and Appellants,

v.

CITY OF DETROIT, a Municipal Corporation; EDWARD J. JEFFRIES, Mayor of the City of Detroit; JOHN H. WITHERSPOON, Commissioner of Police of the City of Detroit, County of Wayne and State of Michigan; LOUIS L. BERG, Superintendent of Police of the City of Detroit, County of Wayne and State of Michigan,

Defendants and Appellees.

OPINION

Before the Entire Bench
Reid, J.

By their bill of complaint plaintiffs sought to have declared null and void an order of the police commissioner of the city of Detroit dated June 5, 1919, forbidding Detroit police officers to become members of the Fraternal Order of Police, and also sought an injunction restraining defendants from carrying into effect such order or any order of similar purport; plaintiffs further sought to have declared void an order in February 1943, discharging plaintiffs

Heine and Duggan as police officers of the city of Detroit. Plaintiffs appeal from a decree of the circuit court for the county of Wayne dismissing their bill.

Involved in this case is the reasonableness of the order of the police commissioner of the city of Detroit, prohibiting the members of the Detroit police force from becoming members of a local organization of the State Lodge of Michigan, Fraternal Order of Police, and whether the order prohibiting such membership violated the constitutional rights of assembly, guarantee of equal privileges and immunities, and of equal protection of the laws.

Defendants claims that the questions involved are whether the rule of June 5, 1919, prohibiting membership in the Fraternal Order of Police was a valid exercise of authority by the police commissioner in view of the constitution and by-laws of the national, State and local lodges, and has the police commissioner authority to pass such prohibitory rule based upon the history, past conduct and leadership of the Fraternal Order of Police, and whether the action of the police commissioner was a reasonable exercise of authority when we consider sale of associate memberships and car emblems as matters contrary to public policy. Defendants further contend that the two plaintiff police officers had a fair hearing before the trial board, at which hearing they were found guilty of insubordination, and that the court ought not to set aside the order of dismissal where there is competent evidence to sustain the findings of the trial board.

On June 5, 1919, James Inches, then commissioner of police of the city of Detroit, issued an order forbidding police officers of his department to become members of plaintiff Fraternal Order of Police. Defendant John H. Witherspoon was commissioner of police of the city of Detroit from June 1, 1942, until his resignation, January 1, 1944,

and while he was commissioner and before January 1, 1943, had occasion to investigate the Fraternal Order of Police and its activities. He examined the file of his office respecting the plaintiff order and discussed the file with officers in the city of Detroit police department and with police officers in other police departments.

On Thursday, January 28, 1943, a group of Detroit police officers, including two plaintiffs, patrolman Howard Heine and detective Bernard L. Duggan, attended a dinner meeting in Detroit, at which there were also present a number of police officers, including representatives of the Hamtramck lodge of Fraternal Order of Police, Henry Mida of the Dearborn police department, and president of the State Lodge, Fraternal Order of Police, and also a reporter from the Detroit Free Press. A temporary organization was set up with Heine as temporary president and Duggan as temporary secretary. This meeting was without the knowledge of defendant Witherspoon. An account of the meeting was published in the Detroit Free Press the evening of January 29, 1943. The next morning plaintiff Heine was summoned to police headquarters to a meeting with defendants Witherspoon and Berg, the latter being superintendent of police of the city of Detroit. A transcript of the stenographic minutes of the meeting appears in the record. At that meeting Heine related the circumstances of the Thursday meeting, denied that he knew of the existence of Commissioner Inches' order prohibiting membership in the Fraternal Order of Police; stated that he had been advised that membership in the organization was contrary to the orders of the police department but that he had allowed himself to be elected president. Plaintiff Heine was then given a copy of Inches' order, whereupon he said that if the Fraternal Order of Police was permitted to organize in the police department he would join it but if not, he would not join, and that he would pull out of the organization, and

also stated that no new meeting was contemplated and that the organization intended to present the matter to the commissioner for permission to organize. Upon leaving this meeting, plaintiff Heine went directly to the Eagles Hall in Detroit, where a secret organization, initiation and election meeting was held. Heine was elected permanent president and plaintiff Duggan, secretary. On February 1, 1943, Duggan was summoned to police headquarters before defendant Witherspoon. A transcript of the stenographic minutes taken at that meeting appears in the record. Duggan refused to reveal any information relative to the meeting held on January 28, 1943, on the ground that this meeting was a secret meeting. He said he knew of the rule prohibiting membership in the Fraternal Order of Police but he joined nevertheless because he figured the rule was wrong and he was willing to be the "guinea pig" in a test case. He admitted being on duty from 8 to 4 of a day when he attended a meeting of the Fraternal Order of Police at 3 o'clock, without having first obtained permission to leave his work prior to the end of his shift.

On February 2, 1943, charges of misconduct were preferred against Heine, charging disobedience of rules and orders of the department, reporting falsely to a superior officer and insubordination. On the same day similar charges were preferred against Duggan, with the additional charge of being absent without leave. Both officers were ordered to appear before the police trial board on February 5, 1943, to answer the charges. The transcripts of the trials before the police trial board are in the office of the clerk of this court. Neither plaintiff Heine nor plaintiff Duggan took the stand to offer any testimony in their own defense and neither of them offered to withdraw from the Fraternal Order of Police. At the trial of plaintiff Heine, which occurred February 5, 1943, there was sufficient testimony produced to show that on January 30, 1943, Heine,

with knowledge of the Inches' order of 1919, promised the defendants Witherspoon and Berg that no further meetings of the Fraternal Order of Police were contemplated while there was an order prohibiting membership in the Fraternal Order of Police and also promised defendants that nothing further would be done until the matter could be presented to the commissioner in an orderly manner for a change in the rule. Notwithstanding this conversation plaintiff Heine thereafter had gone directly from police headquarters to the organization meeting of the local Fraternal Order of Police, and permitted himself to be initiated and to be elected permanent president. The trial of plaintiff Duggan was on February 6, 1943. Plaintiff Duggan had been brought before the commissioner on February 1, 1943, had told the commissioner that he believed the rule was wrong and that he was going to remain a member notwithstanding the rule. Both plaintiffs Heine and Duggan were promptly found guilty of insubordination and were dismissed from the department.

The record in this case shows that at the time of the discharge of the two plaintiffs the Fraternal Order of Police was substantially the same kind of an organization that it was as described in the case of *Fraternal Order of Police v. Lansing Board of Police & Fire Commissioners,* 306 Mich. 68. In that case we said, p. 80:

> "The constitution and by-laws of plaintiff's national, state and local organizations which were received in evidence provide in effect that citizens may become associate members upon payment of dues of not less than $5 per year, and such associate members will be furnished 'a membership card' and car 'emblem.' One would be naive, indeed, to assume that such automobile emblem did not carry with it the intimation of special privileges to associate members. This of itself is enough to require the determination that the existence of plaintiff organiza-

tion within the law-enforcement body of a municipality is contrary to public policy."

On the trial of this cause, March 28, 1945, plaintiffs offered some showing to the effect that the bylaws of the Detroit lodge, Fraternal Order of Police, banned associate memberships and sale of car emblems. Defendant Witherspoon testified that the first time that he learned of such a prohibition in the bylaws of the local lodge was at the trial in question in March, 1945. However, the following statements were made by witness Duggan, February 1, 1943, in an interview before defendant Commissioner Witherspoon:

"Q. You said at one time in describing the nature of this organization that you thought it was a good organization because the membership was restricted to police officers?

A. Right.

Q. Is that your understanding of the organization?

A. Well, they have what is called associate membership.

Q. That doesn't disturb you—you think that is perfectly proper?

A. Well, that's a matter to be used with circumstances. If they take in men that put you in the middle, that's something not to permit.

Q. They do permit them?

A. Well, they do have provision for associate members."

The supposed amendments to the constitution, excluding associate members, and forbidding the sale of car emblems, if such amendments were ever actually made at all, must have been effectuated after the discharge of plaintiffs Heine and Duggan.

However, there is nothing in this record doing away with the force and effect of the undisputed showing that both

plaintiffs Heine and Duggan were guilty of insubordination. We reiterate what was said by Justice Bushnell and those who concurred in his opinion in the case above cited, quoting from *Carter v. Thompson,* 164 Va. 312 (180 S. E. 410):

> "Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained."

The defendant commissioner is necessarily vested with a large measure of discretion and the burden of showing arbitrary action is upon those who charge it. Plaintiffs have not met such burden.

The order promulgated by the police commissioner of the city of Detroit is considered to be within the scope of the authority granted under the charter of the city of Detroit, and cannot be said to be arbitrary or unreasonable. The plaintiffs are not deprived of any constitutional right.

The decree dismissing plaintiffs' bill of complaint is affirmed. A question of public importance being involved, no costs are allowed.